Supreme Court, U.S.
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No. 02 937

IN THE

Supreme Court of the United States

PAUL COX,

Petitioner,

-v-

DAVID H. MILLER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err by holding that Petitioner's statements to his fellow Alcoholics Anonymous members were not privileged as a matter of law when no fact-finding hearing was held in any state or federal court, thus precluding Petitioner from proving a violation of the First Amendment by the state courts' refusal to suppress these statements as confidential religious communications?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court's opinion (Hon. Charles L. Brieant, USDJ) dated July 30, 2001, granting the petition for a writ of habeas corpus is published at *Cox v Miller,* 154 F.Supp.2d 787 (SDNY 2001) and is annexed as Appendix A. The Second Circuit Court of Appeals' opinion (Hon. Robert Sack, USCJ) dated July 17, 2002, reversing the Judgment of the District Court is published at 196 F.3d 89 (2nd Cir. 2002) and is annexed as Appendix B. A petition for rehearing and for rehearing *en banc* was denied by the Court of Appeals by Order dated September 13, 2002 and is annexed as Exhibit C.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion on July 17, 2002. Petitioner's timely application for rehearing was denied by Order dated September 13, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution which provides, in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

The Fourteenth Amendment to the United States Constitution which provides, in pertinent part that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Procedural History

Petitioner Paul Cox was convicted after a jury trial in Westchester County, New York, of two counts of Manslaughter in the First Degree.[1] He was sentenced on March 14, 1995, to two maximum consecutive indeterminate terms of 8 1/3 to 25 years in state prison, for a total of 16 2/3 to 50 years. His conviction was affirmed by the Supreme Court of the State of New York, Appellate Division, Second Department, in a Decision dated September 27, 1999. *People v Cox*, 264 AD2d 854 (2nd Dept. 1999) Leave to appeal was denied by the New York State Court of Appeals on February 7, 2000. *People v Cox*, 94 NY2d 902 (2000) The petition for a writ of *habeas corpus* was granted on July 30, 2001 by United States District Court Judge Charles L. Brieant. *Cox v Miller*, 154 F.Supp.2d 787 (SDNY 2001) The District Court held that Petitioner's rights under the Establishment and Free Exercise Clauses of the First Amendment were violated by the State courts' failure to recognize Petitioner's statements to his fellow Alcoholics Anonymous members (which were used in the prosecution's investigation and were received in evidence at trial) as privileged communications under New York State Civil Practice Law and Rules § 4505.

By Opinion dated July 17, 2002, the United States Court of Appeals for the Second Circuit reversed the Decision of the

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[1] An earlier trial had ended with a hung jury.

District Court and remanded with a direction that the writ of habeas corpus be vacated and the Petition be dismissed. *Cox v Miller,* 196 F.3d 89 (2nd Cir. 2002) The Court of Appeals held that "[b]ecause [Petitioner] failed to establish that his communications to members of A.A. were made in confidence for the purpose of obtaining spiritual guidance, . . . they are not privileged under well-established principles of New York law." *Cox,* 196 F.3d at 112-113.

Petitioner filed with the Court of Appeals a petition for rehearing and for rehearing *en banc.* The Petition was denied by Order of the Court of Appeals dated September 13, 2002.

Statement of Facts

In the early morning hours of December 31, 1988, Lakshman Rao Chervu and his wife Shanta Chervu were murdered, knifed to death in the bedroom of their single family residence at 36 Lincoln Street in Larchmont, New York. Petitioner, then 21 years of age, had lived in that house until age seven, when his parents moved to another residence about six-tenths of a mile away. Petitioner suffered throughout his life from a serious learning disability and personality disorder with borderline psychotic and antisocial traits. At the time of the crime, Petitioner was also an alcoholic.

On December 31st, following a drinking spree and automobile accident in Larchmont, Petitioner began to walk toward his present residence. Petitioner has no memory of entering the Chervu residence or of killing them, nor does he remember what happened to the knife or his clothes. Based on his history of parricidal impulses, his dreams, and the evidence against him, he began to worry that he was the killer.

In 1990, Petitioner joined Alcoholics Anonymous and began to work the Twelve Steps. Petitioner began confiding his fears and nightmares about the Chervu murders to fellow AA members.

Robbery did not appear to the police to be a motive, and it was never determined if anything had been taken from the house. Petitioner did not become a suspect until May, 1993 after the police had spoken to several AA members. After Petitioner's arrest, his fingerprints matched latent prints found at the scene.[2]

A Westchester County forensic scientist testified that on January 3, 1989, he determined that one of the pillow cases from the Chervus' bed had a blood stain which appeared to be a fingerprint, which was later determined to be blood consistent with the male victim. The fingerprint matched Petitioner's left index finger.

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[2] Defense counsel objected to all fingerprint testimony based upon the probable cause argument made during the first trial. During the first trial, defense counsel moved to suppress fingerprint and palmprint evidence on the ground that the police did not have probable cause to arrest Cox on May 28, 1993. Counsel contended that the statements taken from AA members simply stated that Cox was only talking about dreams, and that this did not provide probable cause. The prosecutor responded that a pretrial motion should have been made, but defense counsel replied that he had requested, but was denied access to the AA statements. The court denied the motion.

A Westchester Police latent fingerprint examiner[3] testified that on January 3, 1989, he developed latent fingerprints on broken glass from a rear entrance door, and two latent palmprints on the moulding near the doorknob of that door. A palmprint on the moulding was positively matched with Petitioner's left palm. Two latent fingerprints on the broken glass were positively matched to Petitioner's left index and left middle finger.

At trial the various AA witnesses testified anonymously; their testimony is summarized as follows.

MR. C. testified that in 1991 he became Petitioner's AA sponsor – a guide to take a member through the Twelve Steps.[4] All AA members are expected to work through all of the Twelve Steps.

After Petitioner's first 90 days in AA, C. asked him to write the 4th Step. Petitioner telephoned C. one night, saying he was having trouble writing the 4th Step, and when C. inquired why,

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[3] Defense counsel moved to suppress the fingerprint and palmprint testimony on the ground that the police did not have probable cause to arrest Cox because the statements upon which they relied were privileged communications made by Cox to AA members; the prints were a tainted fruit of the arrest.

[4] C. described certain of the Twelve Steps as follows:

4th Step: "where you write a moral inventory, an honest and searching moral inventory . . . of yourself". (451)

5th Step: "when you share that inventory with God, yourself and another human being." (451)

8th Step: "ma[k]e a list of persons we had harmed and became willing to make amends to them." (451)

9th Step: "Ma[k]e amends to such people except when to do so would injure them or others." (A92)

Petitioner replied there was an "incident that he wasn't sure of, that he was in a blackout" and then mentioned "a coincidence, a murder, a double murder in Larchmont . . . [in] the house he had grown up in." Petitioner told C. that on the night of the murders, he had drank into a blackout and woke up the next day not remembering anything from the night before." Petitioner and C. dealt with this subject in conversations repeatedly after the first call; "more would come out . . . [and] he remembered waking up and there was blood on his clothes and his mother got rid of the blood or the bloody clothes". Petitioner told C. that "he could walk through [36 Lincoln] blindfolded". C. testified that "there was never any confession to me . . . [but that Petitioner] was just worried that this might have been done". (A95) Other than within his AA group, C. told no one about these conversations until he was approached and questioned by Westchester detectives in 1993.

MR. O.[5] testified that he met with Petitioner and C. one night in 1991, and Petitioner "described some vague memories of an incident he thought he was involved with involving a double homicide". He told O. that he had been drunk that night, in a blackout, was having "vague memories" and "dreams" about the night, and that "he had woken up in the morning and there was some blood on his clothes". A few weeks later, Petitioner told O. that "he had seen some people and that he realized that it was

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[5] O. testified that one of the basic principles of AA is the anonymity. (A115) He also agreed that the 4th and 5th Steps were the context in which Cox reached out to him and C.

him that was involved in the crime . . . [and that] he had killed the two people in Larchmont"[6]

O. testified that what an AA member told a sponsor – even if outside an AA meeting – would be considered confidential.

MR. A. testified that in a 1991 AA "big book" meeting, Petitioner told him "that he may have killed a couple of people . . . that New Year's eve of '88-89, he had gotten into a car accident and he woke up on New Year's day and he was covered in blood and his clothes were in a pile on the floor and he was pretty agitated and he was afraid that his mother had seen him and he thought that she may have undressed him . . . that he was sure that he had killed them . . . that he knew the house so he probably would have been able to get in through a window . . . he thought that he might have been killing his parents . . . he didn't remember anything about the night . . . he described it as a blackout." On cross-examination, A. testified that Petitioner "told me he didn't remember anything, but he believed he had done it."

MR. S. testified that after an AA meeting Petitioner told him that "he thought or was pretty sure that he had killed two people while they slept in their home in New Rochelle . . . that he stabbed them to death while they slept . . . something about waking up in bloody clothes and getting rid of them down the laundry chute or throwing them in the laundry . . . and also getting rid of the knife . . . he had gotten into the house through a window . . . [h]is old house where he used to live . . . he said

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[6] Another AA member, MR. W., testified that he told the police that Cox never discussed any specifics about the murders, but rather expressed guilt "and saying he felt suicidal".

he was drunk or under the influence of alcohol and drugs, something like that."

S. testified that when he was first approached by the police, he resisted speaking, and one officer told him he could go to jail if he didn't tell them what he knew about this incident.

MR. R. testified that in 1991-92, Petitioner told him that in bad dreams "he got into a car accident and he woke up with bloody clothes . . . he was very vague [and] didn't really know what happened." In later conversations, Petitioner expanded, stating that in his dreams "he got into a car accident . . . was walking back to his house [but at] the house that he lived in as a young boy, and he broke in through a window; that he walked throughout the house, picked up a knife . . . went upstairs . . . the woman woke up first and that he stabbed her and that the man was pleading with him and that he stabbed him also, that he slit their throats before he left and he went home . . . that he got rid of the clothes in the apartment buildings on Chatsworth Avenue . . . that he put them in the incinerator and that he threw the knife in Manor Park . . . in the water." R. asked Petitioner why there were no fingerprints, and Petitioner "said something about cleaning up".

MS. H. testified that in February, 1993, she became a roommate of MR. R. and Petitioner. Prior to that Petitioner and H. had attended AA meetings together, and Petitioner told her that if she was going to be his roommate she needed to know "that he was waking up with nightmares" involving the murders of the Indian doctors. Petitioner told H. that "he had broken into the house on Lincoln Street . . . through the pane of glass in the back, opened the door to the house, went into the kitchen, got a knife and went upstairs and stabbed the two, the couple sleeping on the bed." Petitioner told her "that in his head he thought he

was going home to his parent's house and was killing his parents . . . that he was drunk at the time and that this was a blackout and it was coming out in bits and pieces over the next couple of years." Petitioner also told her "that he went back the next day with cleaning supplies to cleanup and he went upstairs and did clean the next day."

The subject was never discussed again between them, and H. became Petitioner's roommate. On cross-examination, H. testified that the memories Petitioner described to her were coming back to him in dreams. When Petitioner told her of these memories, his demeanor and voice changed, and he "seemed to shrink down", with a little boy's voice.

Petitioner testified that he first joined AA in November, 1990 and has continuously been a member until the present; he has had nothing to drink nor taken a non-prescription medication since November, 1990.

After college, Paul realized that "the drinking was controlling" him, and reached out to AA in March, 1990. At first, he felt "uncomfortable" because AA was too "religious based . . . there was a lot of God all over the place", but after a few months, he stopped drinking, and began attending AA daily, "went at it wholeheartedly", and "replaced the drinking with God".

Once Paul became sober, the dreams "became more frequent, more vivid and . . . were really starting to frighten me . . . I was afraid that I might have committed these murders and . . . it was tearing me up inside." After an AA fourth step meeting, he told a girl he had met in AA, Jessica, that he was afraid he might have committed the murders. Jessica suggested that Paul call his sponsor "and fill him in on it." That night, Paul called Mr.

C., and a day or two later, told him about the dreams and his fears. Paul spoke to other AA members, including Mr. R, his roommate, with whom he would "throw around ideas" about the dreams and the murders, such as wiping away fingerprints, what happened to the clothes and knife. Paul spoke to Mr. S, his new sponsor, then Mr. A., and continually threw back and forth ideas of what happened to the clothes and knife. Paul informed his new roommate, Ms. H, in early 1993 about the dreams and his fears.

On May 20, 1993, while driving his truck looking for his girlfriend, Paul was surrounded by police cars and ordered out of his truck at gunpoint. The police told him his girlfriend had "been in an accident". Paul was later arrested for the murders, and still then did not know whether he had done it, but now "I look at the evidence and, I mean I must have . . . I just can't believe it."

Paul still has no memory of what happened to the knife or his clothes.

When asked if his conversations about the dreams with AA members were expected to "have an aura of confidentiality", Paul replied, "One of the mottos is what you hear her, what you see here, let it stay here . . . That's part of what makes AA work."

The trial court charged the jury that there was no privilege or confidentiality with respect to the statements made by Petitioner to AA members.

The Decisions Below

The District Court held that, since the Twelve Steps of A.A. must be treated as religious practice for Establishment Clause purposes,

> [t]here is no principled basis for a court to hold that . . . disclosure of wrongs to a fellow member as ordained by the Twelve Steps does not qualify for purposes of a privilege granted to other religions similarly situated. Clearly it is possible as a matter of Constitutional law to have and to practice a religion without having a clergyman as such, or where all members exercise the office of clergyman to the extent of receiving confessions or confidences.
>
> If § 4505 of the New York C.P.L.R. be construed as expressing an endorsement of the traditionally recognized forms of religious expression over a less conventional religious expression, the state has violated the Establishment Clause of the First Amendment to the United States Constitution. Similarly, to the extent that a Free Exercise issue is involved, if the state is treating AA meetings with less protection than any other form of religious communication which carries assurances of confidentiality, a Constitutional violation also exists.

Cox, 154 F.Supp.2d at 792.

The Court of Appeals reversed, holding that Petitioner "bore the burden to establish that his communications to [his fellow A.A. members] fell within the scope of § 4505", and that "[h]e failed to carry it." *Cox*, 296 F.3d at 110. At the same time, however, the Court acknowledged that "[b]efore [the state

criminal] trial, defense counsel moved for 'a pre-trial hearing concerning the . . . surrounding circumstances of any statements made by the defendant to any person, including a determination as to whether such statements were privileged'", *Cox*, 296 F.3d at 96,[7] that the state trial court denied the motion, without a hearing, stating that "there is no privilege issue here", *Cox*, 296 F.3d at 97, and that "[a]t Petitioner's second trial, defense counsel restated his objection, emphasizing that Petitioner's conversations with fellow A.A. members 'should have been privileged'" and that "[t]he trial judge again overruled the objection." *Cox*, 296 F.3d at 97.

Thus, despite the fact that Petitioner was never permitted to offer proof on the subject, the Court of Appeals found that "Petitioner failed to establish that he spoke with fellow A.A. members in confidence and 'for the purpose of obtaining spiritual guidance'", and therefore did not meet the State statutory standard enunciated by the New York Court of Appeals in *People v Carmona*, 82 NY2d 603 (1993).[8] Specifically, the Court of Appeals found:

> "Nothing in Cox's testimony suggests that this emotional outpouring to [his] lover reflected a search for spiritual guidance." *Cox*, 296 F.3d at 110;
>
> "Cox argues that he sought C's 'guidance' about a spiritual matter, namely, how to handle the fourth step of

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[7] The Court of Appeals noted that "[t]he State opposed the motion on the ground[] . . . that Petitioner's statements, 'even if made in express or implied confidence, do not fall within the recognized privileges protecting them from disclosure or use at trial.'" *Cox*, 2002 WL 1565262 at *6.

[8] *Carmona* is discussed below at Point 2 of the Reasons for Granting the Writ.

> A.A.'s religiously imbued program of recovery from alcoholism", . . . [b]ut the record does not, we think, bear out this argument." *Cox*, 296 F.3d at 110;
>
> ". . . the nature of [C's and O's] ongoing communications with Cox *suggests* that he sought practical and legal, not spiritual, advice."*Cox*, 296 F.3d at 110 (emphasis added);
>
> ". . . there is no basis in the record for a conclusion that Cox's multiple conversations with Mr. S., . . . had anything whatever to do with Cox's desire for spiritual or religious guidance." *Cox*, 296 F.3d at 110.
>
> ". . . Cox spoke with other A.A. members primarily to unburden himself, to seek empathy and emotional support, and perhaps in some instances to seek practical guidance (e.g., legal advice). Nothing in the record suggests that Cox confessed to A.A. members 'for the purpose of obtaining spiritual guidance.'" *Cox*, 296 F.3d at 111.

These findings were based solely upon the testimony at Petitioner's trial where the issue of whether Petitioner was speaking "for the purpose of obtaining spiritual guidance" was neither material nor relevant. Any proof on this issue which Petitioner might have attempted to offer at trial – through his own testimony, the testimony of witnesses with knowledge of the spiritual nature of the Twelve Steps (and particularly the Fourth Step), or through the cross-examination of the prosecution's AA witnesses – would have been inadmissible. Petitioner therefore never had the opportunity to fully and fairly litigate the question of whether he spoke to his fellow AA members for "the purpose of obtaining spiritual guidance."

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED BY HOLDING THAT PETITIONER'S STATEMENTS TO HIS FELLOW ALCOHOLICS ANONYMOUS MEMBERS WERE NOT PRIVILEGED AS A MATTER OF LAW WHEN NO FACT-FINDING HEARING WAS HELD IN ANY STATE OR FEDERAL COURT, THUS PRECLUDING PETITIONER FROM PROVING A VIOLATION OF THE FIRST AMENDMENT BY THE STATE COURTS' REFUSAL TO SUPPRESS THESE STATEMENTS AS CONFIDENTIAL COMMUNICATIONS.

The District Court correctly held that Petitioner's constitutional rights were violated by the State courts' failure to recognize Petitioner's statements to his fellow A.A. members as privileged communications under New York Civl Practice Law and Rules §4505.[9] In turn, the Court of Appeals violated those same rights by holding, without Petitioner ever having been afforded an evidentiary hearing, that Petitioner's statements were not sufficiently religious to qualify for the statutory privilege.

1. The Religious Nature of AA's Twelve Steps

In *Griffin v Coughlin*, 88 NY2d 674, 683 (1996), *cert. den*, 519 U.S. 1054 (1997), the New York Court of Appeals held that

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[9] N.Y.S. CPLR § 4505 provides: "Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as a spiritual advisor."

"doctrinally and as actually practiced in the 12-step methodology, adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization." The *Griffin* Court explained that followers of the Twelve Steps

> are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe. In "working" the 12 steps, participants become actively involved in seeking such a God through prayer, *confessing wrongs* and asking for removal of shortcomings. These expressions and practices constitute, as a matter of law, religious exercise for Establishment Clause purposes . . .

Griffin, 88 NY2d at 683(emphasis added).

In *Kerr v Farrey,* 95 F.3d 472, 497-480 (7th Cir. 1996) the Seventh Circuit stated its agreement with *Griffin*, and rejected an argument that the "program escaped the 'religious' label" and held that "[a] straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being."

In *Warner,* 173 F.3d 120, the Second Circuit observed that "[t]he A.A. program to which Warner was exposed had a substantial religious component" and that the "[t]rial judge reasonably found that it 'placed a heavy emphasis on spirituality and prayer, in both conception and in practice.'" The Court in *Warner* had "no doubt that the [A.A.] meetings Warner attended were intensely religious events." *Id.* In *DeStefano v Emergency Housing Group,* 247 F.3d 397, 406 (2nd Cir. 2001), the Second Circuit held that the District Court "rightly considered the A .A. program . . . to be a 'religion' for Establishment Clause pur-

poses" and that "[i]t [wa]s too late in the day . . . to argue otherwise."

In the Opinion below, the Court noted that the Second Circuit is "not alone in concluding that A.A.'s activities must be treated as religious for purposes of such Establishment Clause analysis." *Cox*, 296 F.3d at 108, fn 11, *citing Rauser v. Horn, No. 98-1538*, 1999 WL 33257806, at *7 (W.D.Pa. Nov.2, 1999) (finding coerced participation in A.A. or the materially indistinguishable Narcotics Anonymous program as a condition of parole to violate the Establishment Clause), *rev'd on other grounds*, 241 F.3d 330 (3d Cir.2001); *In re Garcia*, 106 Wash.App. 625, 630 (2001) (agreeing that "mandating attendance at [A.A.] classes" violates the Establishment Clause but finding no violation where "alternative classes without religious-based content [we]re provided"). "[W]hen engaging in Establishment Clause analysis in certain settings", the Court below observed, "[it] must treat A.A. the same as [it] would a group or organization that is a 'religion' in the popular sense because some of A.A.'s activities and modes of expression are religious in nature." *Cox*, 296 F.3d at 109.

As observed by one commentator, even before *DeStefano* and *Cox* were decided, "judicial consensus is emerging behind the proposition that AA is a religious program for Establishment Clause purposes. Therefore, courts facing cases that involve the issue of AA's religiousness should devote little, if any, analysis to this question." 97 Columbia Law Review, 437, 448 (March, 1997)

2. The New York Court of Appeals' Interpretation of CPLR § 4505

In *Carmona*, 82 NY2d at 608, the New York Court of Appeals stated that:

> [a]lthough often referred to as a "priest-penitent" privilege, the statutory privilege is not limited to communications with a particular class of clerics or congregants. Nor is it confined to "penitential admission[s] * * * of a perceived transgression" or avowals made "under the cloak of the confessional"

Instead, "in enacting CPLR § 4505, the Legislature intended to recognize 'the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance' . . . without regard to the religion's specific beliefs or practices." *Carmona*, 82 NY2d at 608.

In *Carmona's* concurring opinion, three judges argued for the adoption of a "'four-canon' analysis" which would have required, *inter alia*, that the communication "be penitential in character" and "made to a member of the clergy". *Carmona*, 82 NY2d at 623-624. This analysis was expressly rejected by the *Carmona* majority which held that, "[d]espite the concurrence's 'four canon' analysis, New York's test for the privilege's applicability distills to a *single* inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance . . ." *Carmona*, 82 NY2d at 609 (emphasis added).

This broad interpretation of CPLR § 4505 by the New York Court of Appeals is binding upon this Court. *Johnson v Fankell*, 520 U.S. 911, 916 (1997) ("Neither [the Supreme] Court nor any

other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."

3. The Constitution's Absolute Mandate that Government Maintain Neutrality Between Religion and Religion

The First Amendment's Establishment and Free Exercise Clauses and the Fourteenth Amendment's Equal Protection Clause require that CPLR § 4505 be applied in a non-discriminatory manner. All communications made in confidence for the purpose of "obtaining spiritual guidance" must be treated equally. This means that statements made in the course of observing the religious Twelve Steps must be given the same consideration and protection as communications made in the course of any other form of religious observance or practice.

A. The Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v Valente*, 456 U.S. 228, 244 (1982) The First Amendment mandate of "governmental neutrality between religion and religion" is "absolute." *Larson*, 456 U.S. at 246. "The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." *Abington School District v Schemp*, 374 U.S. 203, 305 (1963), *quoted in Larson*, 456 U.S. at 246.

"Government in our democracy . . . must be neutral in matters of religious theory, doctrine, and practice", and it "may not aid, foster, or promote one religion or religious theory against another . . . " *Epperson v Arkansas*, 393 U.S. 97, 104 (1968)

"Whether the key word is "endorsement', 'favoritism' or 'promotion', the essential principle remains the same. The Establishment Clause at the very least prohibits government from appearing to take a position on questions of religious belief . . ." *County of Allegheny v American Civil Liberties Union*, 492 U.S. 573, 593-594 (1989)

Thus, even if Alcoholics Anonymous is not deemed to be a "religion", *per se*, it is still entitled to the protections given to more established, conventional religions. The First Amendment does not draw a distinction between "religious activities", on the one hand, and religious activities carried out as part of a "religion", on the other. Nor is it within the province of the legislature or the judiciary to drawing a distinction between professional religious advisers and religious advisers who act voluntarily. Were this Court to rule otherwise, traditional forms of religious expression, such as confessions made to church-designated clergy members, would receive First Amendment protection, while less traditional forms of religious expression, such as confessions made to non-paid fellow-observers of a non-traditional, non-hierarchical faith, would be entitled to a lesser protection or no protection at all. Such distinctions are obviously abhorrent to the Establishment Clause.[10]

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[10] In *Wilson v N.L.R.B.*, 920 F.2d 1282 (6th Cir. 1990), for example, the religious objector provision of Section 19 of the National Labor Relations Act was held to violate the Establishment Clause because it exempted from union membership "[a]ny employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations. . ." 29 U.S.C. §169. The problem with Section 19, according to the Sixth Circuit, was that it "require[d] the court to validate the legitimacy of the religion, body, or sect and to verify the existence and longevity of its doctrine regarding labor unions. *Id.* The

(footnote continued)

B. The Free Exercise Clause

The Establishment Clause "prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245. Equality of religious rights "would be impossible in an atmosphere of official denominational preference." *Larson*, 456 U.S. at 245. "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion . . . favoring neither one religion over others nor religious adherents collectively over nonadherents. *Board of Educ. of Kiryas Joel Village School Dist. v Grumet*, 512 U.S. 687, 696 (1994)

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Division v Smith*, 494 U.S. 872, 877 (1990) This Court has clearly "reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Frazee v Illinois Dept. of Employment Sec.*, 489 U.S. 829, 834 (1989) The "broad goals" underlying the Free Exercise Clause – promoting "the inviolability of individual conscience and voluntarism", as well as "pluralism of thought" – "can best be satisfied if any belief that is 'arguably religious' is considered 'religious' for the sake of free exercise analysis." *International Soc. For Krishna Consciousness, Inc. v Barber*, 650 F.2d 430, 438-439 (2nd Cir. 1981)

(footnote continued)
Wilson Court also found Section 19 to be defective because it increased "the advantages of membership in the type of religious organization described in the statute" and therefore "ha[d] the effect of advancing the beliefs of one sect over those of another."

A refusal to apply the CPLR § 4505 privilege to Petitioner's statements would have an undeniably chilling effect upon A.A. members' free exercise of their religious practices, coercing them to abandon the Twelve Step form of worship for worship in a more traditional, established church. *Compare, Scherr v Northport-East Northport Union Free School District*, 672 F.Supp. 81, 92 (EDNY 1987) (statute requiring that parents who sought an exemption from mandatory student immunization be "bona fide members of a recognized religious organization" held unconstitutional)

C. The Equal Protection Clause

Whenever the Supreme Court is "presented with a state law granting a denominational preference, [the Court's] precedents demand that [it] treat the law as suspect and that [it] apply strict scrutiny in adjudging its constitutionality." *Larson*, 456 U.S. at 246.[11] See, also, *Rupert v Director, U.S. Fish and Wildlife Service*, 957 F.2d 32, 34 (1st Cir. 1992) ("Although [Petitioner's] claim is rooted in the Establishment [and Free Exercise Clause[s], '[n]eutrality in its application requires an equal protection mode of analysis.'"); Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal.L.Rev. 753, 797 (1984)

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[11] One commentator has observed that since the priest-penitent privilege represents an accommodation of religion, and the privilege has been "extended well beyond its original purpose of accommodating Catholic religious rules, states are not at liberty to include established Western religions and exclude sects that do not conform to this model." Horner, Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society, 45 Drake L. Rev. 697, 721 (1997) Thus, "courts that refuse to interpret statutes broadly to include non-Western religions, or those that choose to grant the privilege to only established Western religions while denying the privilege to others, risk interpreting the statutes unconstitutionally." *Id.*

(equal protection principles "overarch" the tests of the religion clauses).

Of course, "distinctions on religious grounds must be strictly scrutinized", *Corporation of Presiding Bishop v Amos*, 483 U.S. 327, 338 (1987), and New York simply has no interest, compelling or otherwise, in withholding from Petitioner's A.A. statements the same privilege given to more traditionally recognized religious faiths.[12] In fact, given the Court of Appeals' observations about the apparent efficacy of A.A.,[13] if New York has any compelling interest in this regard, it is to make sure that AA communications *are* privileged so that members

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[12] *See*, *Sharpe v Worland*, 527 S.E.2d 75 (Ct. App. N. Car. 2000) (communications at AA meetings constitute "nonpublic information"); *Shedrick v Coughlin*, 176 AD2d 391 (3rd Dept. 1991) (AA records of an inmate held exempt from disclosure under Public Officers Law § 87(2)(a) because they are deemed to be confidential under 42 U.S.C. §290dd-3[a]). *Compare*, *Cruz v Beto*, 405 U.S. 319, 322 (1972) (if a Buddhist were denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhered to conventional religious precepts, then there was "palpable discrimination by the State against the Buddhist religion" which violated both the First and Fourteenth Amendments).

Since "[t]he rights of inmates belonging to minority or non-traditional religions must be respected to the same degree as the rights of those belonging to larger and more traditional denominations", *Al-Alamin v Gramley*, 926 F.2d 680, 686 (7th Cir. 1991), then the rights of defendants who make religious admissions under the assurance of anonymity, albeit within the less traditional contexts, must be given the same respect under CPLR § 4505 as a Catholic making a confession to a priest.

[13] The Court of Appeals stated that it has "no reason whatever to doubt what we have been told: that A.A. is a vastly worthwhile endeavor; that it has saved the lives, health or well-being of untold thousands of Americans, at least in part because it requires participants "to turn [their] will and ... lives over to the care of God as [they] underst[an]d him." *DeStefano*, 247 F.3d at 422.

can embark freely upon their Twelve Step course without any fears of government interference and breaches of confidence. *See, also*, Thomas Reed, The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members, 70 St. John's Law Review 693 (1996) ("The social ramifications of compulsory disclosure of confidential communications among AA members . . . provide compelling arguments in favor of the adoption of such a privilege").[14]

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[14] In the Court below the District Attorney countered by pointing to the spectre of terrorism, arguing that "there are many terrorist organizations, hate groups, and other secret societies that could meet the District Court's test for entitlement to an evidentiary privilege. . ." This argument reflected a misunderstanding of both the nature of the statutory privilege and the reach of the First Amendment religion protections.

First, "organizations", "groups" and "societies" are not what the evidentiary privilege protects. The privilege protects communications, and, specifically, communications that are made "for the purpose of obtaining spiritual guidance . . ." *Carmona*, 82 NY2d at 609.

Second, a criminal (that is, terrorist) conspiracy is never subject to the evidentiary privilege, *even if such conspiracy were deemed to be an essential part of a religious observance*. This is because the Supreme Court has made it clear that:

> [t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." . . . [citing] . . . To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" – permitting him, by virtue of his beliefs, "to become a law unto himself," . . . [citing] . . . --contradicts both constitutional tradition and common sense.

Smith, 494 U.S. at 885. Therefore, communications made by religious terrorists for the purpose of bringing about the death of innocent people would not be protected by the First Amendment.

Similarly, if Petitioner were to solicit a fellow AA member to

(footnote continued)

4. The Opinion Below Violates the Constitutional Mandate of Neutrality

In view of the First and Fourteenth Amendments' mandate of neutrality, it is clear that the "single" *Carmona* inquiry – "whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance" – must apply to all forms of "spiritual guidance" and not just to those that are recognized as being part of an established or traditional "religion".

The Court of Appeals, while assuming "that all [of Petitioner's] relevant conversations were made in confidence", held that "even if the Establishment Clause requires that some communications between A.A. members in some circumstances be protected by New York's cleric-congregant privilege, [Petitioner's] communications to fellow A.A. members do not qualify for such protection". *Cox*, 296 F.3d at 109-110. While such finding might conceivably be justified upon a sufficient factual predicate, no forum ever took proof on this issue. Instead, the Court of Appeals based its finding upon its own *presuppositions* about the nature of "spiritual guidance", in general, and A.A.'s religious doctrine and practice, in particular.

(footnote continued)
commit a crime, the First Amendment would not require that communication to come within the CPLR § 4505 privilege, even if such solicitation was deemed to be an integral part of the religious Twelve Step process (which, of course, it is not). But because Petitioner's confessions of crimes were not crimes in themselves, and those confessions were made "in confidence and for the purpose of obtaining spiritual guidance", *Carmona*, 82 NY2d at 609, the First Amendment does require that they come within the privilege.

The Court of Appeals, in other words, presumed, albeit implicitly, that it had a sufficient understanding of the manner in which A.A. members are supposed to seek "spiritual guidance", as well as the settings in which, and the people from whom, A.A. members are to conduct such search. This presumed – that is, foundationless – understanding about the nature of A.A. activities – "activities [which] must be treated as religious for purposes of such Establishment Clause analysis", *Cox*, 296 F.3d at 108, fn 11– clearly violates the First and Fourteenth Amendment requirement that government maintain neutrality on matters of religious belief.

In the Opinion below, for example, the Court of Appeals summed up its analysis by stating that Petitioner "spoke with other A.A. members primarily to unburden himself, to seek empathy and emotional support, and perhaps in some instances to seek practical guidance (e.g., legal advice). Nothing in the record suggests that Cox confessed to A.A. members 'for the purpose of obtaining spiritual guidance.' *Cox*, 296 F.3d at 111, *quoting Carmona*, 82 N.Y.2d at 609. A.A.'s basic texts, however, make it clear that such unburdening and search for empathy and emotional support is an integral and essential part of the spiritual quest.

By way of another example the Court of Appeals denigrates Petitioner's confession to "Jessica". In the Court's words, when, "[i]n a fit of tears, [Petitioner] told [Jessica] that he believed he had killed the Chervus", he was simply engaging in an "emotional outpouring to a lover" rather than "a search for spiritual guidance". *Cox*, 296 F.3d at 110. Nothing in this record, however, gave the Court any basis for drawing this distinction. Since Petitioner was never given a hearing (despite his repeated requests) in which the question of his *purpose* for

making his A.A. statements was either material or relevant,[15] the determination below is based solely upon the Judges' own subjective, preconceived notions about the differences between an "emotional outpouring" and a "search for spiritual guidance" as well as the possible interplay between the two. Surely, if, instead of to Jessica, Petitioner had made the very same statement to a priest, in the very same "fit of tears", the Court would have held, *as a matter of law*, that such statement was made in an effort to obtain spiritual guidance.[16] Here, Petitioner was not even permitted to show that, *as a matter of fact*, he was seeking spiritual guidance. The Court of Appeals' prejudgment as to the "emotionality", versus the "spirituality", of Petitioner's conduct, in the face of Petitioner's claim that his conduct was performed in the context of a *judicially recognized* religious activity, is blatantly discriminatory.

When the allegations of a habeas petition, if proved, would entitle a petitioner to relief, a federal court "must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court." *Townsend v Sain*, 372 U.S. 293, 312 (1963); *Tate v Wood*, 963 F.2d 20, 24 (2nd Cir. 1992) ("a federal court is required to hold an evidentiary hearing if the petitioner did not receive an adequate state court evidentiary hearing, that is, one that is full and fair."); *U. S. ex rel. Maselli v Reincke*, 383 F.2d 129, 131 (2nd Cir. 1967) ("a federal district court . . .must conduct [an independent inquiry]

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[15] The issue of privilege, and therefore whether Petitioner was seeking spiritual guidance, was not an issue which could have been pursued during the trial as it was not relevant to any of the factual issues to be determined by the jury.

[16] At the very least, should the District Attorney have raised any factual dispute as to why the statement was made to the priest, the Court would have directed an evidentiary hearing.

. . . whenever the state court proceeding did not resolve the merits of the factual dispute or adequately develop the material facts").[17]

Based upon the State courts' failure to afford Petitioner any opportunity to fully and fairly litigate the privilege issue, and in view of the presumptuous nature of the Court of Appeals' findings, there was simply no intellectual basis for directing the District Court to dismiss the petition rather than conduct an evidentiary hearing. Since Petitioner "bore the burden to establish that his communications to [his fellow A.A. members] fell within the scope of § 4505", *Cox*, 296 F.3d at 110, it was incumbent upon the Court of Appeals to give Petitioner the opportunity to meet that burden.

It must be emphasized that Petitioner is *not* suggesting that the courts interpret A.A.'s religious doctrine since this would obviously result in an excessive governmental entanglement

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[17] "According to *Townsend*, an evidentiary hearing must be held if . . . the merits of the factual dispute were not resolved in the state hearing; . . . [or] the material facts were not adequately developed at the state-court hearing . . ." *Ferguson v. Abrams*, 1998 WL 305631, *4 (E.D.N.Y.), *citing Townsend*, 372 U.S. at 313. See, also, *Glock v. Singletary*, 84 F.3d 385 (9th Cir. 1996) (habeas claim that attorney rendered ineffective assistance of counsel was not meritless on its face and, thus, required evidentiary hearing to resolve historical facts concerning counsel's performance); *Toney v. Gammon*, 79 F.3d 693, 697 8th Cir. 1996) (generally, a habeas petitioner is entitled to an evidentiary hearing in federal court if the petition "alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing."); *Perillo v. Johnson*, 79 F.3d 441, 444 (5th Cir. 1996) (When there is a "factual dispute, [that,] if resolved in the petitioner's favor, would entitle [her] to relief and the state has not afforded the petitioner a full and fair evidentiary hearing," a federal habeas corpus petitioner is entitled to discovery and an evidentiary hearing.)

with religion.[18] Rather, Petitioner is simply asserting the basic right to present evidence that when he made his statements to his fellow A.A. members he was, in fact, seeking "spiritual guidance." Bearing in mind, for example, that it was after an AA fourth step meeting that Petitioner told Jessica, that he was afraid he might have committed the murders, and that, as C. testified, the fourth step is "where you write . . . an honest and searching moral inventory . . . of yourself", Petitioner must at least be permitted to testify as to whether this is what he saw himself doing when he was speaking with Jessica.

In sum, by directing the District Court to dismiss the petition, the Court of Appeals arbitrarily and capriciously precluded Petitioner from proving that he was in fact "seeking spiritual guidance." This was constitutional error. An appellate court cannot properly hold that a litigant failed to meet his burden of

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[18] Petitioner readily acknowledges that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds", *Hernandez v C.I.R.*, 490 U.S. 680, 699 (1989), *quoted in Employment Division v Smith*, 494 U.S. 872, 877 (1990), and thus it is not within the judicial ken to raise such questions when a litigant testifies that he believed confidentiality to be central to the practices of the AA faith. Judges "must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. *See, Hobbie v Unemployment Appeals Com'n of Florida*, 480 U.S. 136, 144, fn 9, (1987) (in applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs). "If judicial inquiry into the truth of one's religious beliefs would violate the free exercise clause, an inquiry into one's reasons for adopting those beliefs is similarly intrusive." *Callahan v Woods*, 658 F.2d 679, 687 (9th Cir. 1981) "So long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible". *Id.*

proving that his A.A. statements were made "in search of spiritual guidance", if that litigant had never been permitted to present such proof. To do so, as did the Court below, is to prejudge the claim of religious confidentiality and thereby discriminate against the Twelve Step form of religious practice.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A—District Court Opinion of Hon. Charles L. Brieant, USDJ, dated July 30, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PAUL COX,

Petitioner,

- against -

01 Civ. 3751 (CLB)

MEMORANDUM & ORDER

DAVID MILLER, Supt., etc.,

Respondent.

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Brieant, J.

By his counseled Petition filed May 3, 2001 in this Court, Paul Cox, a state prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction after a jury trial in the County Court of the State of new York, County of Westchester (Cowhey, J), on December 6, 1994, for two counts of manslaughter in the first degree in violation of New York Penal Law. The conviction was affirmed by the Appellate Division of the New York Supreme Court, Second Judicial Department on September 27, 1999. *People v. Cox*, 264 A.D.2d 854 (2d Dept. 1999) and leave to appeal to the New York Court of Appeals was denied on February 7, 2000. He was sentenced on March 14, 1995 to two consecutive terms of 8-1/3 to 25 years, for a total of 16-2/3 to 50 years. The Petition asserts some six separate Points as grounds for relief. We now consider Points 5 and 6.

In Point 5, Petitioner claims that his fingerprints and palm print found at the scene were the fruits of an arrest unsupported by probable cause and that their admission was in violation of the Fourth Amendment. In Point 6, Petitioner claims that his statements to his fellow [Alcoholics Anonymous] members constitute confidential communications, the use of which [to establish probable cause to arrest him and take his fingerprints (Point 5)] violated Cox' rights under the First and Fourteenth Amendments."

This Court now summarizes the factual background of the conviction solely to the extent necessary to support discussion of these two issues. Petitioner, age twenty-one at the time of the crime, who had throughout his life suffered with a serious learning disability and personality disorder with borderline psychotic and anti-social traits, murdered Lakshman Rao Chervu and his wife Shanta Chervu in the early morning hours of December 31, 1988. The crime was committed in the bedroom of their single family residence at 36 Lincoln Street in Larchmont. The murder was particularly brutal, effected with a knife taken from the Chervu kitchen after Cox had broken into the house by breaking a windowpane. Mr. Cox had lived in that home until age seven, at which time his parents moved to another residence about six-tenths of a mile away.

In the evening of December 30, 1988, Petitioner along with two others had gone on a drinking spree at a local bar. They had consumed from a pitcher several portions of a drink known as a Kamikaze.[1] After midnight and in the early morning of

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[1] Kamikaze takes its name from Japanese suicide pilots during World War II who would crash their one-person aircraft directly into a battleship or similar target with the intention of accomplishing their own death as well as the destruction of the target. It is a mixed drink composed of vodka, triple-

December 31st they left the bar with Cox driving his mother's automobile. He drove off the road and the car crashed into a guardrail. The two fellow drinkers returned to the bar and Cox began to walk towards his parent's house where he resided (a distance of 2.8 miles) in the course of which he passed the Chervu home (2.2 miles from the accident) broke into the building and committed the murders. He left a fingerprint and a palm print at the scene of the crime. Psychiatric testimony adduced at trial was to the effect that in addition to his psychiatric problems previously mentioned, Mr. Cox was an alcoholic and suffered from an acute alcohol amnesic syndrome, or blackout, at the time fo the crime. He walked to his family home after the crime and disposed of his bloody clothes, as well as the knife which he had stolen from the Chervu kitchen.

As may be imagined, this remained for some time an unsolved crime. When he awoke the next day, Cox heard the news of the crime, and that it had taken place in his former home. He had a history of parricidal impulses and he knew, notwithstanding his alcohol induced "blackout," that he was the killer.

On November 11, 1990, Petitioner joined the Harbor Island Chapter of Alcoholics Anonymous.[2] Alcoholics Anonymous was founded in 1935 in Akron, Ohio as an effort to help Alcoholics obtain sobriety. Initially AA was a self-help group which did not consider or represent itself as an established religion, but helped many Alcoholics, who continued to belong

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sec, and lime juice, unlikely to sharpen judgment and discretion.

[2] Petitioner cites 42 U.S.C. § 290 dd-2, which provides for limited confidentiality of records of a substance abuse program or activity. This statute by its terms is limited to those programs or activities receiving direct or indirect federal assistance. There is no evidence in the record that the Harbor Island Chapter of AA receives such assistance.

to and worship with their own churches or other religious groups while belonging to AA. In 1939 the founders published a text which set forth the "Twelve Steps of Recovery." This represents the core belief of AA, which in the ensuing years has been extremely successful internationally, with more than a million members in the United States alone.

The Twelve Steps must be accomplished one by one, beginning with the first step. A new member will be sponsored and assisted by one or more existing members of the organization. Members interact on a first name basis only. The entire relationship is both anonymous and confidential. Members are forbidden from telling outside, statements made at a meeting. The eighth step requires the new member to have "made a list of all persons we had harmed and became willing to make amends to them all." Step five, preliminary to step eight, required that the new member have "admitted to God, to ourselves, *and to another human being* the exact nature of our wrongs." (Emphasis added)

In compliance with this discipline imposed upon him by AA, Cox admitted to at least eight fellow AA members that he "believed" that he had committed the two murders in his former residence while he was blacked out from alcohol and that he had dreams about his possible involvement with the murder; that he had used a knife; that he had disposed of the knife and his bloodied clothes.

In late 1992 or early 1993, a woman member of AA, identified in the trial record as "Ms. H" met Petitioner through her membership in AA, and in February 1993 began to share an apartment with him and with one "Mr. R," another member of

AA.[3] Ms. H revealed to her own psychologist that she knew of the crime. On his advice and on the advice of an attorney whom he obtained for her, the District Attorney was made aware of her knowledge and that of the other AA members, all of whom were interrogated by the authorities and in apparent violation of the confidentiality which AA holds out to its communicants, and possibly the psychologist's duty of confidentiality, corroborated the story. As a result of this information Petitioner was arrested and his fingerprints taken. As might be expected, they matched the fingerprint and palm print at the crime scene.

The doctrine of inevitable discovery cannot be applied in this case. Although Cox had been fingerprinted in the course of his military service, those prints ordinarily would not have been accessed in connection with the investigation. Accordingly, the fingerprints which tie Petitioner to the crime are a direct result of the disclosure to authorities of the communication which Petitioner had with his fellow members of AA.

Petitioner's argument is that his efforts to comply with the Twelve Steps are privileged and that communications in furtherance of the discipline imposed by AA on its communicants may not be disclosed to his detriment. In light of § 4505 of the New York C.P.L.R. relating to confidential communications to clergy, Petitioner now contends that what he told his fellow members was privileged and if this statutory codification and extension of the priest-penitent privilege does not extend to such communications then the statute is unconstitutional as applied. In either case, he is entitled to relief on due process or equal protection grounds.

Section 4505 reads in relevant part as follows:

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[3] The Prosecutor and trial court honored the convention of anonymity.

Section 4505. Confidential Communication to Clergy Privileged.

Unless the person confessing or confiding waives the privilege, a clergyman or other minister of any religion or duly accredited Christian Science practitioner shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor.

The statute has its historical origin in the Roman Catholic sacrament in which a person privately confesses his or her sins to God, through a priest, in order to receive absolution. That priest by Canon law is required to maintain the confidentiality of the confession. Commentators agree that § 4504 "recognizes the societal value of encouraging communications of this nature and extends the privilege of the confidences to lay persons seeking spiritual advice from the clergy of any religion." Practice Commentary by Vincent C. Alexander, Book 7B of McKinney's Consolidated Laws of New Yhork Annotated (1992).

The common law in New York recognized no privilege for confidential communications or confessions made to clergymen or other spiritual advisors. *Richardson on Evidence Tenth Ed. by Jerome Prince*, § 424. The initial New York statute granting a privilege was passed in 1876; since then, the privilege has been broadened by amendments adopted from time to time over the years.

In *People v. Carmona*, 82 N.Y.2d 603, 608-9 (1993) the New York Court of Appeals held:

> Although often referred to as a "priest-penitent" privilege, the statutory privilege is not limited to communica-

tions with a particular class of clerics or congregants. Nor is it confined to "penitential admission[s] . . . of a perceived transgression" or avowals made 'under the cloak of the confessional'" (concurring opn. at 623, 624, quoting *Matter of Keenan v. Gigante*, 47 NY2d 160, 166). On the contrary, in enacting CPLR 4505, the Legislature intended to recognize "the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance." (*Matter of Keenan v. Giganti* supra, at 166) without regard to the religion's specific beliefs or practices.

While the privilege may have "ha[d] its origins in the Roman Catholic sacrament of Penance, in which a person privately confesses his or her sins to a priest [and t]he priest is enjoined by Church law . . . to maintain the confidentiality of the confession." the New York statute is intentionally aimed at all religious ministers who perform "significant spiritual counseling which may involve disclosure of sensitive matters" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4505, at 683). Indeed, the drafters of the current codification struck the concluding phrase from the predecessor provision, which made the privilege applicable to communications made "in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs" (*see*, Civ Prac Act §351), because the phrase was ambiguous and rendered it "doubtful whether the rule applies to any confessions other than those to a Catholic priest" (Second Preliminary Report of Advisory Comm on Prac and Pro, 1958 NY Legis Doc No. 13, at 93). Accordingly, what is more appropriately dubbed the "cleric-congregant" privilege

> is applicable to ministers of all religions, most of which had no ritual analogous to that of the Catholic confession (*see*, Alexander, *op. cit.*, at 683). Despite the concurrence's "four canon" analysis, New York's test for the privilege's applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance (*Matter of Keenan v. Gigante*, *supra*, at 166).

The Appellate Division did not deal with this issue except by its ordinary boilerplate phrase to the effect that all other issues were "either unpreserved for appellate review or without merit."[4] The Appellate Division brief of the People argued that no statutory or common law privilege attached to communications between members of Alcoholics Anonymous, and that "[i]t is a matter solely for the legislature, which has not chosen to endow AA communications with confidentiality." (Brief at p. 29) The Appellate Division must be deemed to have adopted that argument. Indeed, the People also argued that "there was no evidence whatsoever that Alcoholics Anonymous is a religious organization as required by statute, or that another members is a clergyman or other member of "any religion or duly accredited Christian Science practitioner."

This Court would agree were the issue an open one in this Circuit, with Respondent's arguments made in the same brief that "although there are religious underpinnings to the AA philosophy, AA is not a religion but rather a self-help organization designed to overcome the problems of alcoholism." Our Court of Appeals has subsequently held in the context of an

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[4] The sole issue addressed on appeal was whether the evidence established that petitioner suffered from temporary insanity and therefore was not criminally responsible.

Establishment Clause case that AA is a religion and that imposing attendance at AA meeting upon a criminal defendant violated the Establishment Clause by reason of the religous nature of the Twelve Steps. *Warner v. Orange County Department of probation*, 115 F.3d 1068, *reaff'd* 173 F.3d 120 (2d Cir. 1999). In *Griffin v. Coughlin*, 88 N.Y.2d 647, 683 (1996), the New York Court of Appeals held that "Doctrinally and as actually practiced in the Twelve Step methodology, adherence to the AA fellowship entails engagement in religious activity and religious proselytization:

> members are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe. In 'working' the Twelve Steps, participants become actively involved in seeking such a God through prayer, confessing wrongs and asking for removal of shortcomings. These expressions and practices constitute as a matter of law religious exercise for establishment clause purposes."

Griffin, 88 N.Y.2d at 683.

The record before this Court shows that in addition to the numerous religious references in the Twelve Steps, meetings of AA are closed with a recitation of The Lord's Prayer. There is no principled basis for a court to hold that AA is a religion for Establishment Clause purposes, and yet that disclosure of wrongs to a fellow member as ordained by the Twelve Steps does not qualify for purposes of a privilege granted to other religions similarly situated. Clearly it is possible as a matter of Constitutional law to have and to practice a religion without having a clergyman as such, or where all members exercise the office of clergyman to the extent of receiving confessions or confidences.

If § 4505 of the New York C.P.L.R. be construed as expressing an endorsement of the traditionally recognized forms of religious expression over a less conventional religious expression, the state has violated the Establishment Clause of the First Amendment to the United States Constitution. Similarly, to the extent that a Free Exercise issue is involved, if the state is treating AA meetings with less protection that any other form of religious communication which carriers assurances of confidentiality, a Constitutional violation also exists.

This issue was adequately tendered to the Appellate Division on appeal and the Petitioner cannot be dismissed on claims of non-exhaustion. This is particularly true in light of Respondent's brief in the Appellate Division where the People argue that AA is not a religion and that disclosures made in furtherance of its doctrines are not privileged under § 4505. The argument is sufficient notice since all Judges are well aware of the Constitutional issues present when religion intersects with governmental action.

The point is critical because but for the violation of § 4505 the record is clear that the People would never have identified the fingerprint and palm print, which properly should have been suppressed as "fruit of the poison tree."

The numerous remaining challenges to the conviction Points 1 though 5 of the Petition have been considered by this Court to the extent that any of them alone or together arise to a Constitutional level. They do not involve a decision contrary to or involving an unreasonable application of Federal Law, nor are they based on an unreasonable determination of the facts in light of the evidence which was before the state court, and are lacking in merit.

Conclusion

The Petition for the writ is granted. The issuance thereof is stayed on the Court's own motion pending appellate finality.

SO ORDERED.

Dated: White Plains, New York
July 30, 2001

CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

Appendix B—Second Circuit Court of Appeals Opinion of Hon. Robert Sack, USDJ, dated July 17, 2002

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2001

(Argued: February 13, 2002 Decided: July 17, 2002)

Docket No. 01-2515

PAUL COX,

Petitioner-Appellee,

—v.—

DAVID H. MILLER, Superintendent,
Eastern Correctional Facility,

Respondent-Appellant.

Before:

SACK, B.D. PARKER, JR., and GIBSON,*

Circuit Judges.

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* The Honorable John R. Gibson, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, Jr., *Judge*) granting the petitioner a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the ground that the state trial court's failure to extend New York's cleric-congregant privilege, N.Y. C.P.L.R. § 4505, to exclude testimony based on, and forensic evidence discovered as a result of, communications made by the petitioner to fellow members of Alcoholics Anonymous violated the Establishment Clause of the First Amendment to the United States Constitution. Assuming that Alcoholics Anonymous is a religious organization for purposes of this analysis, we hold that the petitioner's communications fall outside the scope of New York's cleric-congregant privilege because he failed to establish that he made them for the purpose of obtaining spiritual guidance, as New York's cleric-congregant privilege requires.

Reversed and remanded with instructions to vacate the writ of habeas corpus and dismiss the petition.

RICHARD E. WEILL, First Deputy District Attorney (Jeanine Pirro, New York District Attorney of Westchester County; Diane E. Selker, Assistant District Attorney, of counsel), White Plains, NY, *for Respondent- Appellant.*

ROBERT N. ISSEKS (Alex Smith, of counsel), Middletown, NY, *for Petitioner-Appellee.*

SACK, *Circuit Judge:*

INTRODUCTION

Respondent David Miller, Superintendent of New York State's Eastern Correctional Facility, where petitioner Paul Cox is incarcerated, appeals from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, Jr., *Judge*) granting Cox's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 6, 1994, a New York State jury found Cox guilty of two counts of manslaughter in the first degree for the 1988 killings of Drs. Lakshman Rao Chervu and Shanta Chervu, a married couple. On December 31, 1988, the Chervus resided in the house where Cox had lived as a child. While alcoholically intoxicated, Cox broke into that house, took a knife from the kitchen, and stabbed the Chervus to death. For more than four years thereafter, the crime remained unsolved.

On November 11, 1990, Cox joined Alcoholics Anonymous ("A.A.") and, according to his testimony, thereafter refrained entirely from consuming alcoholic beverages. But as Cox became sober, he increasingly suffered from vivid, anxiety-ridden dreams in which he experienced flashbacks. These eventually led him to realize that it was he who had killed the Chervus.

The Fourth and Fifth Steps of A.A.'s twelve-step therapy program, respectively, instruct members to undertake "a searching and fearless moral inventory" and to "admit[ ] to God, to [them]selves, and to another human being the exact nature of [their] wrongs." At about the time Cox reached the Fourth Step, he felt a need to confide his guilt of the Chervu killings to other A.A. members. Between 1991 and 1993, Cox confessed to no

fewer than seven A.A. members. For example, Cox told his prospective roommate, Ms. H,[1] an A.A. member, because he thought that she should be aware of his recurrent nightmares about the killings before deciding whether to share an apartment with him. He described the killings to her in some detail.

Despite the disclosure, Ms. H moved in with Cox and another A.A. member. Two months later, in the Spring of 1993, H moved out. Then, on her psychiatrist's advice, she revealed to local police what Cox had told her. The police renewed their investigation into the Chervu murders and solicited statements from at least six other A.A. members to whom Cox had confessed. On May 20, 1993, the police arrested Cox and matched his palm print to one that had been taken at the scene of the killings.

Shortly thereafter, a New York State grand jury indicted Cox for second degree murder. Defense counsel then made a pretrial motion to suppress, as privileged, Cox's statements to A.A. members. Supreme Court, Westchester County (James R. Cowhey, *Justice*) denied the motion. Defense counsel also objected to the admission of Cox's statements at his first trial, which ended in a hung jury, and raised in vain a similar objection at his second trial. The second jury convicted Cox of second-degree murder, *see* N.Y. Penal Law § 125.25(1), but found that he acted in a state of extreme emotional disturbance, a mitigating circumstance that reduced his conviction to first degree manslaughter, *see id.* § 125.25(1)(a).

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[1] The trial transcript and the parties identify the A.A. members who testified at trial by one-letter pseudonyms. We follow suit. Cox's former girlfriend Jessica, the A.A. member to whom he first confessed, did not testify at trial and is referred to in the transcript and herein by her first name.

Cox appealed his conviction to the Supreme Court Appellate Division, Second Department, arguing that the trial court erred by refusing to exclude the A.A. members' testimony as privileged cleric-congregant communications pursuant to N.Y. C.P.L.R. § 4505. *See* Pet.'s Br. to App. Div. at 41-52. The Appellate Division did not address this argument except to find it "either unpreserved for appellate review or without merit." *People v. Cox*, 264 A.D.2d 854, 854, 696 N.Y.S.2d 177, 178 (2d Dep't 1999) (*"Cox I "*). The Court of Appeals thereafter denied Cox's petition for leave to appeal. *People v. Cox*, 94 N.Y.2d 902, 707 N.Y.S.2d 386, 728 N.E.2d 985 (2000) (Bellacosa, *Judge*).

On May 3, 2001, Cox petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Cox claimed, *inter alia*, that "statements to his fellow A.A. members constituted confidential communications, the use of which violated [his] rights under the First and Fourteenth Amendments." Pet.'s Br. in Support of his Petition for a Writ of Habeas Corpus at 83. The district court granted Cox's petition. *Cox v. Miller*, 154 F.Supp.2d 787, 793 (S.D.N.Y.2001) (*"Cox II "*). It reasoned that because Second Circuit case law has treated A.A. as a religion for purposes of the Establishment Clause,[2] New York State could not constitutionally construe its cleric-congregant privilege to exclude from its protection communications made during the course of unconventional forms of "religious expression," including "the disclosure of wrongs to a fellow member [of A.A.] as ordained by the Twelve Steps." *Cox II*, 154 F.Supp.2d at 792. Because the State subpoenaed A.A. members to testify about those disclosures and introduced at trial forensic evidence

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[2] "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I.

that would not have been obtained but for the use of Cox's statements by the police, the district court held that Cox's conviction had been obtained in violation of his constitutional rights under the Establishment Clause. *Id.* at 792-93.

We do not dispute the axiom of constitutional law upon which the district court relied: that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). We conclude, however, that Cox failed to establish that his communications to other A.A. members would have been privileged, even were New York's cleric-congregant privilege required to be construed to protect communications made among members of A.A. The privilege only protects disclosures made "in confidence and for the purpose of obtaining spiritual guidance." *People v. Carmona*, 82 N.Y.2d 603, 609, 606 N.Y.S.2d 879, 882, 627 N.E.2d 959, 962 (1993). With few, if any, exceptions, the record fails to establish that Cox communicated with fellow A.A. members in order to seek spiritual guidance. We therefore hold that even were the Establishment Clause to require that some communications between A.A. members in some circumstances be protected under New York's cleric-congregant privilege, Cox's communications in issue here do not qualify for such protection. We need not consider the district court's assertion that the Establishment Clause requires states to extend the cleric-congregant privilege to those who "practice a religion without having a clergyman as such, or where all members exercise the office of clergyman to the extent of receiving confessions or confidences." *Cox II*, 154 F.Supp.2d at 792.

BACKGROUND

The Killing of the Chervus

On the evening of December 30, 1988, Paul Cox and two of his friends attended a neighborhood keg party. By 11:00 P.M., the kegs had been emptied. Cox and his friends retired to "Gary's Barleycorn," a local bar where they continued drinking. At about 2:00 A.M. on the morning of December 31, the trio left Gary's Barleycorn in a car owned by Cox's mother. With Cox driving, the car soon veered off the road somewhere in Larchmont, New York, careening into a guardrail. Cox's friends decided to return to Gary's Barleycorn to resume drinking. Cox abandoned the wrecked car and his friends and wandered toward his parents' home, where he resided at the time.

Along the way, Cox passed the house at 36 Lincoln Avenue, Larchmont, where Drs. Lakshman and Shanta Chervu, a married couple, resided. The Chervus, immigrants from India, had purchased their home from Cox's parents in 1974. Cox lived there as a child until about the age of seven; according to one witness at trial, he boasted that he "could walk through it blindfolded." Still severely intoxicated, Cox broke into the home by smashing a window pane, picked up a knife from the kitchen, walked upstairs to the Chervus' bedroom, and sat at the edge of their bed. Shanta Chervu awoke, and Cox stabbed her. Lakshman then awoke, and Cox stabbed him repeatedly. He then slit the Chervus' throats. (Cox later said that he thought at the time that he was killing his parents.) Before departing, Cox cleaned up in an effort to avoid leaving fingerprints. He then went to his parents' home and fell asleep.

The next morning at about eight o'clock, Cox was awakened by his mother's banging on his bedroom door. The police had

telephoned her at 3:00 A.M. to tell her that her car had been abandoned, and she wanted to know what had happened. Cox concocted a story about a flat tire to explain the accident.

On January 2, 1989, the police discovered the Chervus' bodies. Officers photographed the crime scene, took palm prints and fingerprints, and had autopsies performed. Notwithstanding their efforts, for about four years they were unable to identify a suspect.

Cox testified that he first learned of the killings on January 2, 1989, while watching the evening news. "I immediately ran upstairs and, you know, said, mom, dad, you know, turn on the TV, it's our old house, and, you know, they turned it on and we watched it and that's when we first heard about the murders." Thereafter, Cox began to suffer from anxiety-ridden dreams and "paranoia," which eventually crystallized into a realization that he had killed the Chervus. According to Mr. R, who became Cox's roommate several years later, Cox told R that Cox awoke the morning after the crime to find his clothes covered with blood. He disposed of them in an incinerator and threw the knife with which he had killed the Chervus into a nearby body of water.[3]

Alcoholics Anonymous

Sometime in the spring of 1990, after another night of binge drinking followed by another alcohol-induced blackout, Cox recognized the severity of his drinking problem. With the encouragement of a girlfriend, he began to attend A.A. meetings.

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[3] According to a Westchester County Police report based on the interviews with Ms. H, Cox told H that he had buried the knife.

Founded in 1935 in Akron, Ohio, A.A. now has about 50,000 chapters and one million members in the United States.[4] A.A. informational literature describes A.A. as "a fellowship of men and women who share their experience, strength and hope with each other that they may ... stay sober and help other alcoholics achieve sobriety." The literature states that A.A. "requires no definite religious belief as a condition of membership," but its "program of recovery from alcoholism is undeniably based on acceptance of certain spiritual values." Because A.A. members view alcohol as a "power greater than themselves," they believe that "to achieve and maintain sobriety, [they] need to accept and depend upon another Power recognized as greater than themselves." New A.A. members proceed sequentially through its "Twelve Steps" toward sobriety.[5]

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[4] Though rooted in temperance movements dating back to the late eighteenth century, A.A. grew out of an organization founded by a Lutheran Minister named Frank Buchman who "experienced a religious conversion during a vacation in the British Isles." Thomas J. Reed, *The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members*, 70 St. John's L.Rev. 693, 706 (1996). Buchman's "Oxford Groups" believed in "six assumptions," the antecedents of A.A.'s Twelve Steps, including that "all men are sinners," that "confession is a prerequisite to change," and that "the changed soul has direct access to God." *Id.* at 707-08 & n. 72.

[5] The Twelve Steps of A.A. are:

1. We admitted we were powerless over alcohol--that our lives had become unmanageable.

2. Came to believe that a Power greater than ourselves could restore us to sanity.

3. Made a decision to turn our will and our lives over to the care of God as we understood him.

4. Made a searching and fearless moral inventory of ourselves.

5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs. *(footnote continued)*

At first, Cox found A.A. to be "a too little [sic] religious based"; the references to God made him "uncomfortable." But A.A. meetings helped him control his drinking. On November 11, 1990, Cox joined A.A. and, according to his trial testimony, he never again consumed an alcoholic drink.

Cox's Revelations to Other A.A. Members

Several months after joining A.A., Cox reached the Fourth and Fifth Steps of the Twelve-Step Program, which invite members to make "a searching and fearless moral inventory" of themselves and then to admit "to God, to [them]selves and to another human being the exact nature of [their] wrongs." After an A.A. meeting one night, he drove to the home of his then-girlfriend Jessica, also an A.A. member. In a fit of tears, he admitted that he thought he had murdered the Chervus. Jessica

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(footnote continued)

6. Were entirely ready to have God remove all these defects of character.

7. Humbly asked Him to remove all of our shortcomings.

8. Made a list of all persons we had harmed, and became willing to make amends to them all.

9. Made direct amends to such people wherever possible, except when to do so would injure them or others.

10. Continued to take personal inventory and when we were wrong promptly admitted it.

11. Sought through prayer and meditation to improve our conscious contact with God, as we understood Him, praying only for knowledge of His will for us and the power to carry that out.

12. Having had a spiritual awakening as a result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 402-03 n. 3 (2d Cir.2001); *see generally* Alcoholics Anonymous World Servs., *Twelve Steps and Twelve Traditions* (2000) (explaining the Twelve Steps).

said that she did not believe him capable of such a crime. She recommended he talk about his fears with Mr. C, his "sponsor," an A.A. member assigned to help new members with the Twelve Steps.

Mr. C testified at trial:

> [O]ne night [Cox] called me up in the middle of the night.... He was having trouble writing his fourth step and I said: What's the problem? And I remember specifically, ironically saying, how bad could it be, you didn't kill anyone, did you? And then there was a long pause on the phone....

Cox told C "about this incident that he wasn't sure of" because of a blackout (plainly referring to the Chervus' killings); "he was afraid he might have done this." C asked for Cox's permission to speak to other A.A. members, in particular, Mr. O, a senior member who had been sober for about a decade. Thereafter, according to C's testimony, Cox spoke to C about the incident "dozens of times," "specifically [and] not so specifically."

Mr. C told Mr. O about Cox's situation. O said that he wanted to call his father, an A.A. member and lawyer, to ask for advice. Sometime thereafter, O told Cox that his father had said to tell Cox: "[J]ust don't drink and [do] go to [A.A.] meetings." O thought, however, that it also would be prudent for Cox to hire either "a private detective or a lawyer," referring him to a lawyer named Keith McMillan. Cox met McMillan and recounted his story. McMillan decided not to represent Cox, referring him instead to another lawyer, Andrew Rubin, who later acted as Cox's trial counsel. Cox testified that Rubin advised him "to stay in [A.A.], to get into and stay into [sic] therapy and also not to talk to anyone else about [the Chervu killings]."

Cox followed the first part of Rubin's advice—he stayed in A.A. and began to attend therapy sessions with a therapist recommended by another A.A. member. But he disregarded the third part of Rubin's advice—over the course of the next two years, he continued to share his belief that he had killed the Chervus with other A.A. members, including Mr. A, Mr. S, Mr. R, and Ms. H.

Mr. A, an acquaintance of Jessica, testified that Cox approached him after an A.A. meeting to ask whether he had ever killed anyone. Cox thought he could trust A because, Cox testified, A "was someone who talked openly about his gang involvement out in Oakland [and] who I felt possibly could identify with what I was going through." A told Cox that despite his gang affiliation, he had never killed anyone. Cox then told A in some detail about the Chervu killings. A testified that Cox seemed "agitated" because "he was getting close to the fourth step" and "didn't want to go to jail."

In late 1990 or early 1991, after another A.A. meeting, Cox approached Mr. S. Cox "told [S] that he thought that he [Cox] had done something bad ... [,] that he had killed two people while they slept...." Again, Cox related the events in some detail, describing how he killed the victims and disposed of the bloody clothes and knife the following day. Cox spoke to S about the killings at least a "[c]ouple of times."

In December 1991, Cox moved into an apartment with Mr. R, and the two became friends. Shortly thereafter, Cox told R about a "dream" in which "he woke up with bloody clothes." On two subsequent occasions, Cox filled out the story, describing the Chervu killings, according to R's trial testimony, "in great detail."

In January 1993, Ms. H spoke with Cox and Mr. R about sharing an apartment with them. Cox told H "that there was something he needed to tell [her] if [she] was to be his roommate." He described a recurring nightmare in which he had been "piecing back together a night that had taken place a couple of years previously." Specifically, H testified at trial, Cox said "that he had broken into the house on Lincoln Street, ... broken through the pane of glass in the back, opened the door to the house, went into the kitchen, got a knife and went upstairs and stabbed the two, the couple sleeping in the bed." He also told H that he returned to the home the next day with cleaning supplies.

Events Culminating in Cox's Arrest

Despite Cox's confession to Ms. H, she moved in with Cox and Mr. R in February 1993. She lived with them for about two months before moving back to reside with her parents as the result of the onset of mononucleosis. In May 1993, on the advice of her psychiatrist, H decided to convey to the police what Cox had told her. She met with an officer from the Mamaroneck (New York) Police Department and, according to a police report of that meeting, related that Cox had said that:

> he had killed two people in the house he used to live in when he had a flash back [sic] of abuse. He went in and thought he was killing his parents. He made mention of going back to clean up and that he had buried the knife he used.

H also gave the police the names of seven other A.A. members to whom she believed Cox had confessed his crime. The Mamaroneck police conveyed this information to the Larchmont police, who questioned several of these persons. Each recounted Cox's statements. Based on the police investigation, they

arrested Cox on May 20, 1993. They took Cox's palm prints, compared them to prints found at the scene of the Chervu killings, and found that Cox's left palm print matched a print taken from molding at the point of entry into the Chervu home.

The State Prosecutions

Shortly thereafter, a New York State grand jury indicted Cox for second degree murder. Before trial, defense counsel moved for "a pre-trial hearing concerning the accuracy, voluntariness and surrounding circumstances of any statements made by the defendant to any person, including a determination as to whether such statements were privileged." An attached affidavit of Robert J. Mancuso, a member of the firm representing Cox, stated that:

> law enforcement member[s] were led to Paul Cox after becoming aware of, and then interviewing (in a manner which can only be considered intimidating and threatening), several civilians to whom Paul Cox is alleged to have made statements concerning the two homicides.... These statements were made in reliance upon the historical and necessary blanket of confidentiality which involves the free sharing and communication of issues among A.A. members.

The State opposed the motion on the grounds, *inter alia*, that Cox made the statements in question to private citizens not acting at the behest of law enforcement officials; that "[p]rivilege issues are evidentiary issues, not suppression issues"; and that Cox's statements, "even if made in express or implied confidence, do not fall within the recognized privileges protecting them from disclosure or use at trial." Defense counsel responded that New York state courts recognize the existence of

certain privileges, such as the parent-child and executive privileges, despite the absence of an express statute. He requested a hearing to explore this issue. Supreme Court, Westchester County, denied the motion, stating:

> [T]here is no evidence supporting defendant's claims that his statements were made to witnesses acting at the direction of the authorities. Furthermore, there is no privilege issue here.

At Cox's first trial, the State called one Officer Peters to testify to the identity between Cox's palm print and the print found at the crime scene. Defense counsel objected. He argued that this evidence should be suppressed because, but for the statements made by Cox's A.A. peers, the police would have had no probable cause to arrest or even suspect Cox of the Chervus' killings in the first place. The trial court acknowledged counsel's application for suppression as an issue preserved for appeal, but denied it. Cox's first trial ended in a hung jury and mistrial.

At Cox's second trial, defense counsel restated his objection, emphasizing that Cox's conversations with fellow A.A. members "should have been privileged and therefore [Cox] should never have been arrested; had he not been arrested the prints would not have been obtained from him." The trial judge again overruled the objection. The second jury found Cox guilty of intentional murder, but concluded by a preponderance of the evidence that he had acted while "under the influence of extreme emotional disturbance." N.Y. Penal Law § 125.25. This finding reduced Cox's conviction to two counts of manslaughter in the first degree. *See id.* He was sentenced to two consecutive terms of eight and one-third to twenty-five years imprisonment.

Proceedings in the Appellate Division

Cox appealed to the Supreme Court Appellate Division, Second Department, which affirmed his conviction and sentence. *Cox I*. Defense counsel again raised the issue of an A.A. privilege, arguing that statements made in violation of this privilege should have been suppressed under New York's cleric-congregant privilege. *See* Pet.'s Br. to App. Div. at 41-49. The State answered that "A.A. is not a religion" and "members of the A.A. group would not be deemed clerics." State's Br. to App. Div. at 41. The Appellate Division did not address this issue except to find it, like several other issues raised by Cox on direct appeal, "either unpreserved for appellate review or without merit." *Cox I*, 264 A.D.2d at 854, 696 N.Y.S.2d at 178. Cox's application for leave to appeal to the Court of Appeals was denied. *People v. Cox*, 94 N.Y.2d 902, 707 N.Y.S.2d 386, 728 N.E.2d 985 (2000).

Cox's Habeas Corpus Petition: The District Court's Decision

On May 3, 2001, Cox petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He raised six grounds for relief, including that "statements to his fellow A.A. members constituted confidential communications, the use of which violated Cox's rights under the First and Fourteenth Amendments," and that his "fingerprints [sic] and palm print were the fruits of an arrest unsupported by probable cause and their admission was in violation of the Fourth Amendment." Pet.'s Br. in Support of his Petition for a Writ of Habeas Corpus at 81, 83. The district court limited its analysis to these two issues. *See Cox II*, 154 F.Supp.2d at 788. After canvassing the facts, the court noted that upon learning the identity of Cox's fellow A.A. members from Ms. H, the assistant district attorney "interrogated [them] in apparent violation of the confidentiality which A.A. holds out to

its communicants." *Id.* at 790. Based on this information, the police arrested Cox, took his prints, and matched them to prints found at the crime scene. *Id.*

The district court rejected the idea that the "doctrine of inevitable discovery" applied because "the fingerprints which tie Petitioner to the crime are a direct result of the disclosure to authorities of the communication which Petitioner had with his fellow members of A.A." *Id.* The court then reviewed the origins of New York's cleric-congregant privilege, *id* at 790-91, and quoted the New York Court of Appeals' explanation in *Carmona* that " 'New York's test for the privilege's applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance,' " *Cox II*, 154 F.Supp.2d at 791 (quoting *Carmona*, 82 N.Y.2d at 609, 606 N.Y.S.2d at 882, 627 N.E.2d at 962).

Because the Appellate Division did not address Cox's claim of privilege "except by its ordinary boilerplate phrase to the effect that all other issues were 'either unpreserved for appellate review or without merit,' " *Cox II*, 154 F.Supp.2d at 791 (quoting *Cox I*, 264 A.D.2d at 854, 696 N.Y.S.2d at 178), the district court concluded that the Appellate Division "adopted" the State's arguments: namely, that whether to extend the cleric-congregant privilege to A.A. communications remains within the sole province of the New York legislature, and that in any event A.A. is not a religion. *See id.* at 791-92.

The district court remarked that while it might agree with the respondent "were the issue an open one," this Circuit has held that A.A. is a religion for purposes of the Establishment Clause. *Id.* at 792. The court reasoned that "[t]here is no principled basis for a court to hold that A.A. is a religion for Establishment Clause purposes, and yet that disclosure of wrongs to a fellow

member as ordained by the Twelve Steps does not qualify for purposes of a privilege granted to other religions similarly situated." *Id.* The district court further remarked: "Clearly it is possible as a matter of Constitutional law to have and to practice a religion without having a clergyman as such, or where all members exercise the office of clergyman to the extent of receiving confessions or confidences." *Id.* It therefore held that New York's cleric-congregant privilege must be construed to extend to A.A. communications, lest it violate the Establishment Clause by discriminating against "a less conventional religious expression." *Id.* Because, in the absence of this alleged constitutional violation, the police would not have matched Cox's prints with those taken from the crime scene, the district court concluded that they "properly should have been suppressed as 'fruit of the poison[ous] tree.' " *Id.* at 793. It granted Cox's petition for a writ of habeas corpus but stayed issuance of the writ *sua sponte* pending appellate review. *Id.*

This appeal followed.

DISCUSSION

I. Standard of Review and Procedural Posture

We review *de novo* a district court's decision to grant a writ of habeas corpus. *Morris v. Reynolds*, 264 F.3d 38, 45 (2d Cir.2001). Before the district court granted the writ, however, it had to determine both that the underlying constitutional claim advanced by Cox had been exhausted, *see* 28 U.S.C. § 2254(b)(1)(A) (precluding federal habeas relief unless the petitioner "has exhausted the remedies available in the courts of the State" of conviction); and that it was not procedurally barred by an independent and adequate state ground, *see Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) (noting that the "independent

and adequate state ground" doctrine bars federal habeas corpus relief if "a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement"). We agree with the district court that neither exhaustion nor procedural default precluded its consideration of Cox's constitutional claim on the merits.

A. Exhaustion

1. Principles of Law. Title 28 U.S.C. § 2254(b)(1)(A) requires persons "in custody pursuant to the judgment of a State court" to "exhaust [ ] the remedies available in the courts of [that] State" before a federal court may grant them habeas corpus relief. *Picard v. Connor*, 404 U.S. 270, 275 (1971) (collecting cases); *Daye v. Attorney General*, 696 F.2d 186, 190-91 (2d Cir.1982) (in banc) (same). To exhaust a federal claim, a petitioner must " 'fairly present[ ]' to the state courts the 'substance' of" that claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (quoting *Picard*, 404 U.S. at 275). "This means, in essence, that in state court the nature or presentation of the claim must have been likely to alert the court to the claim's federal nature." *Daye*, 696 F.2d at 192.

In *Daye* we said that a petitioner may "fairly present" a constitutional claim, "even without citing chapter and verse of the Constitution," in at least four ways:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id. at 194; *see also Ramirez v. Attorney General*, 280 F.3d 87, 95 (2d Cir.2001) (same; quoting *Daye*).

2. Analysis. The district court concluded that Cox's arguments to the Appellate Division fairly presented the issue he now raises as grounds for habeas relief. *Cox II*, 154 F.Supp.2d at 792. We agree. In his brief to the Appellate Division, Cox cited, *inter alia*, the decision of the New York Court of Appeals in *Griffin v. Coughlin*, 88 N.Y.2d 674, 649 N.Y.S.2d 903, 673 N.E.2d 98 (1996), *cert. denied*, 519 U.S. 1054 (1997). *See* Pet.'s Br. to App. Div. at 43. In *Griffin*, the court found that "doctrinally and as actually practiced in the 12-step methodology, adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization." *Id.* at 683, 649 N.Y.S.2d at 908, 673 N.E.2d at 103. Relying on *Griffin* and other caselaw, Cox argued that "A.A. is a religious organization for constitutional purposes," Pet.'s Br. to App. Div. at 42, and that the cleric- congregant privilege should extend to communications made between members of A.A., *see id.* at 41-49. Cox also argued that his arrest violated the Fourth and Fourteenth Amendments to the United States Constitution because the evidence supporting probable cause derived from inculpatory statements made by fellow A.A. members. *Id.* at 50- 52.

To be sure, as the appellant argues, Cox's brief focused primarily on persuading the Appellate Division of the policy rationales for extending New York's cleric-congregant privilege to A.A. But a petitioner need not expressly cite "chapter and verse of the Constitution," *Daye*, 696 F.2d at 194, to present an issue " 'in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of a federal question,' " *Fortini v. Murphy*, 257 F.3d 39, 44 (1st Cir.2001) (quoting *Scarpa v. DuBois*, 38 F.3d 1, 6 (1st Cir.1994)), *cert. denied*, 513 U.S. 1129 (1995). Considered as a whole, Cox's

brief sufficed to alert the Appellate Division to the existence of a potential constitutional defect in an interpretation of New York's cleric-congregant privilege that excluded from its scope A.A., which the New York Court of Appeals deems to be a religious organization for at least some Establishment Clause purposes. *Cf. Sanders v. United States*, 373 U.S. 1, 16 (1963) (observing that because "identical grounds [for relief] may often be supported by different legal arguments," or "couched in different language," doubts about "whether two grounds are different or the same ... should be resolved in favor of the applicant") (internal citations omitted).

B. Procedural Default

1. Principles of Law. The "independent and adequate state ground" doctrine precludes federal review of any state court decision that "rests on a state law ground that is independent of the federal question and adequate to support the judgment"; and this rule "applies whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729; *see also Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). We presume, however, that no procedural bar exists where "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman*, 501 U.S. at 734-35 (internal quotation marks omitted); *see also Harris v. Reed*, 489 U.S. 255, 263 (1989) ("[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.") (internal punctuation omitted); *Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir.2000) (noting that "[a]bsent a plain statement" in the decision of the state court that its rejection of a claim rests on a state procedural ground, federal courts "conclusively presume" otherwise).

2. Analysis. The appellant notes that the proceedings in the state trial court provided grounds for the Appellate Division to find Cox's claim procedurally barred. For example, the appellant observes that defense counsel failed to move to suppress the A.A. members' inculpatory statements based on an alleged privilege in his pretrial omnibus motion, as required by N.Y.Crim. Proc. Law §§ 255.10(1)(f) and 255.20(1), thereby waiving this claim. But we see nothing in the decision of the Appellate Division to suggest, let alone state plainly, that it viewed this claim as waived. The court said only that Cox's "remaining contentions," which included whatever constitutional arguments he made, "are either unpreserved for appellate review or without merit." *Cox I*, 264 A.D.2d at 854, 696 N.Y.S.2d at 178. The Appellate Division did not clearly and expressly state that its rejection of Cox's federal claims rested on a state-law procedural bar. *See Coleman*, 501 U.S. at 734-35. Absent a "plain statement," we presume that it did not. *See Jones*, 229 F.3d at 118.

We therefore conclude that Cox's constitutional claim is neither unexhausted nor procedurally barred, and proceed to consider the appropriate standard of review to be applied to it under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214.

C. AEDPA Analysis

The standard of review applicable to the Appellate Division's decision on Cox's privilege claim depends on whether that court disposed of the claim on the merits "rather than on a procedural, or other, ground." *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir.2001). If the Appellate Division adjudicated Cox's claim "on the merits," then we may not grant the writ under AEDPA unless that adjudication "resulted in a decision that was contrary

to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (O'Connor, J., plurality opinion) (explaining the "contrary to" and "unreasonable application" clauses). If the Appellate Division did not adjudicate Cox's claim on the merits, we review it *de novo*. *See Washington v. Schriver*, 255 F.3d 45, 55 (2d Cir.2001).

The Appellate Division held that Cox's remaining claims, including his cleric-congregant privilege claim, were "either unpreserved for appellate review or without merit." *Cox I*, 264 A.D.2d at 854, 696 N.Y.S.2d at 178. The district court evidently assumed that the Appellate Division rejected Cox's federal claims on the merits because it applied AEDPA deference to some of them. *See Cox II*, 154 F.Supp.2d at 792-93. While we "conclusively presume" that a claim is not procedurally barred absent a clear statement to the contrary, *Jones*, 229 F.3d at 118, to determine whether a state court "adjudicated" a claim "on the merits," we would ordinarily apply the distinct analysis adopted by our decision in *Sellan*, *see* 261 F.3d at 314 (adopting the "adjudicated on the merits" analysis set forth in *Mercadel v. Cain*, 179 F.3d 271, 274 (5th Cir.1999)). Here, however, we find it unnecessary to perform that analysis. As in *Washington*, 255 F.3d at 55, our disposition of this appeal would be the same whether we were to review the petitioner's claim *de novo* or with AEDPA deference.

The appellant, assuming AEDPA deference applies, observes that the Supreme Court has never addressed the relationship between "the clergy privilege and the First Amendment" or between "[A.A.] and the First Amendment." Appellant's Br. at 32-33. It therefore argues that we cannot find the Appellate Division's decision either "contrary to, or involv[ing] an

unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). This argument misconceives the potential constitutional question presented here. The issue is not whether the First Amendment mandates a cleric-congregant privilege. Cox does not make that argument. The issue is whether, assuming that A.A. must be treated as a "religion" in this context and in light of the New York legislature's choice to enact a cleric-congregant privilege, courts may, under the Establishment Clause, interpret the privilege to extend to some religions but not to A.A. Cox claims, in other words, that New York's privilege officially discriminates against the "religion" of A.A. We need not and do not reach that issue to resolve this appeal. But we note that the prohibition of official discrimination against religions is undoubtedly "clearly established." *See, e.g., Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) ("[G]overnment should not prefer one religion to another or religion to irreligion.").

II. The Cleric-Congregant Privilege

A. Generally

The cleric-congregant privilege originated in the *sui generis* Catholic sacrament of Penance. *See Lightman v. Flaum*, 97 N.Y.2d 128, 134, 736 N.Y.S.2d 300, 303-04, 761 N.E.2d 1027, 1030-31 (2001); *Nestle v. Commonwealth*, 22 Va. App. 336, 344, 470 S.E.2d 133, 137 (1996) (noting that the privilege had "been established by the Roman Catholic Church as early as the Fifth Century"). Its origins thus predate the development of the modern Anglo-American law of evidence. But the privilege fell

into desuetude after the Reformation, *see* 8 J.H. Wigmore, *Wigmore on Evidence* § 2394, at 869 (J.T. McNaughton rev.1961), and authorities generally agree that it "cannot be said to have been recognized as a rule of the common law, either in England or in the United States," *id.* at 870; *see also Lightman*, 97 N.Y.2d at 134, 736 N.Y.S.2d at 303, 761 N.E.2d at 1030 (2001) (observing that "[t]he clergy-penitent privilege was unknown at common law"); *Keenan v. Gigante*, 47 N.Y.2d 160, 166, 417 N.Y.S.2d 226, 229, 390 N.E.2d 1151, 1154 (1979) ("It has been recognized, without serious disagreement, that there existed no common-law priest-penitent privilege."); *accord Nestle*, 22 Va. App. at 344-45, 470 S.E.2d at 137 (noting that the weight of scholarly authority denies that the cleric-congregant privilege existed at common law at the time of the Founding).

Today, however, every state has enacted the cleric-congregant privilege in some form. Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L.Rev. 225, 231 & n. 39 (1998) (collecting statutes). [6]

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[6] Rule 501 of the Federal Rules of Evidence provides that in the absence of a federal statute, evidentiary privileges under federal law "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Only the Third Circuit has expressly adopted a cleric-congregant privilege under Fed. R. Evid. 501. *In re Grand Jury Investigation*, 918 F.2d 374, 377 (3d Cir.1990). Other federal courts have suggested *in dicta* that one exists. *See, e.g., Mullen v. United States*, 263 F.2d 275, 277 (D.C.Cir.1959) (Fahy, J., concurring); *McMann v. SEC*, 87 F.2d 377, 378 (2d Cir.) (Hand, J.), *cert. denied*, 301 U.S. 684 (1937); *see also Trammel v. United States*, 445 U.S. 40, 51 (1980) (enumerating the priest-penitent privilege among those conventionally recognized); *Totten v. United States*, 92 U.S. 105, 107 (1875) (stating that "suits cannot be maintained which would require the disclosure of [*inter alia*] the confidences of the confessional"); *In re Grand Jury Investigation*, 918 F.2d at 381-83 (collecting and describing other federal cases implicitly recognizing or assuming the existence of the cleric-congregant privilege under federal common law).

The statutes differ in three principal respects: their definition of "clergy," their scope, and the question of to whom the privilege "belongs," i.e., who may claim or waive, the privilege—the cleric, the congregant, or both. *See id.* at 231-32.

The emergence of a cleric-congregant privilege in New York antedates its adoption of the privilege by statute in 1828. In *People v. Phillips* (N.Y. Ct. Gen. Sess.1813), *excerpted in Privileged Communications to Clergymen*, 1 Cath. Law. 199 (1955) ("*Privileged Communications* "),[7] a grand jury indicted Daniel Phillips for receiving stolen goods. Phillips, a Roman Catholic, confessed his crime to one Reverend Anthony Kohlmann, whom the State subpoenaed. *Id.* at 199-200. Kohlmann declined to testify, citing "the law of God and his church [that] whatever is declared in confession, can never be discovered," but must "remain an eternal secret between God and the penitent soul—of which the confessor cannot, even to save his own life, make any use at all to the penitent's discredit, disadvantage, or any other grievance whatsoever." *Id.* at 200 (internal quotation marks and citation to the papal decrees omitted). Notwithstanding the "general rule, that every man when legally called upon to testify as a witness, must relate all he knows," *id.* at 201, the court concluded that "the mild and just principles of the common law" could not be construed to place Kohlmann

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[7] According to *Privileged Communications*, *Phillips* was "[n]ot officially reported, but set forth by the attorney who participated in the case.... The original records of the case are on display in the library of the Court of General Sessions of the County of New York." *Privileged Communications*, *supra*, at 199. *See also City of Boerne v. Flores*, 521 U.S. 507, 542-43 & n. 4 (1997) (Scalia, J., concurring in part) (discussing *Phillips*).

> in such a horrible dilemma, between perjury and false swearing: If he tells the truth he violates his ecclesiastical oath—If he prevaricates, he violates his judicial oath—Whether he lies or whether he testifies he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience.

Id. at 203. But the New York Court of General Sessions did not rest its decision on the common law. The court reasoned that because of the constitutional magnitude of the issue, it "must not be solely decided by the maxims of the common law, but by the principles of our government." *Id.* at 206. The court therefore went on to observe that:

> [r]eligion is an affair between God and man, and not between man and man.... Established religions, deriving their authority from man, oppressing other denominations, prescribing creeds of orthodoxy and punishing non-conformity, are repugnant to the first principles of civil and political liberty....

Id. Citing the Free Exercise Clause of the New York State Constitution, the court concluded that permitting Kohlmann to invoke the cleric-congregant privilege was "essential to the free exercise of [his] religion." *Id.* at 207.

Four years later, however, in *People v. Smith*, 2 City Hall Recorder (Rogers) 77 (N.Y.1817), *excerpted in Privileged Communications, supra,* at 209, the New York Court of Oyer and Terminer and Gaol Delivery declined to extend the privilege to a suspected murderer who had confessed his crime to a Protestant minister. Unlike Roman Catholicism, the court reasoned, the defendant's religion did not *require* confession as a sacrament. *Id.* at 211.

The New York legislature thereafter determined that as a matter of policy, if not constitutional concern, the privilege recognized in *Phillips* should not be limited to Catholicism. In 1828, it adopted a statute that codified and substantially broadened the *Phillips* privilege:

> No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.

Id. at 213 (quoting N.Y.Rev.Stat. 1828, Pt. 3, ch. 7, tit. 3, § 72). Although enacted nearly two centuries ago, salient features of this statute survive in New York's current codification of the cleric-congregant privilege.

B. New York's Cleric-Congregant Privilege

The statute codifying New York's present version of the cleric-congregant privilege provides:

> Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor.

N.Y. C.P.L.R. § 4505 (footnote omitted). Three seminal decisions of the New York Court of Appeals elucidate the meaning and scope of § 4505.

In *Keenan v. Gigante*, 47 N.Y.2d 160, 417 N.Y.S.2d 226, 390 N.E.2d 1151 (1979), a State grand jury subpoenaed an ordained Roman Catholic priest and former New York City Councilman to testify about alleged abuses within the New York City Department of Corrections. *Id.* at 163-64, 417 N.Y.S.2d at 227-29, 390 N.E.2d at 1152-53. The priest refused to testify, claiming both that his conversations were privileged under § 4505 and that to compel him to testify would "jeopardize the free exercise of his ministry." *Id.* at 165, 417 N.Y.S.2d at 229, 390 N.E.2d at 1153. Rejecting both arguments, the Court of Appeals first observed that the New York legislature had enacted an earlier version of § 4505 in "respon[se] to the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized." *Id.* at 166, 417 N.Y.S.2d at 229, 390 N.E.2d at 1154. For this reason, the privilege does not attach to statements merely because they are made to a clergyman; rather, "it is only confidential communications made to a clergyman in his spiritual capacity which the law endeavors to protect." *Id.* The court observed that the communications sought to be privileged had not been made in the context of the cleric-congregant relationship, and therefore, "the revelation of such conversations, spoken outside the sphere of confidentiality, cannot be said to fall within the sanctuary of the priest-penitent privilege." *Id.* at 167, 417 N.Y.S.2d at 230, 390 N.E.2d at 1154.

In *People v. Carmona*, 82 N.Y.2d 603, 606 N.Y.S.2d 879, 627 N.E.2d 959 (1993), the New York Court of Appeals explained § 4505 at greater length in the context of criminal proceedings. Carmona had murdered a woman by strangulation and then fled. He surrendered to the police after consulting two clergymen, both of whom had advised him to do so. *See id.* at 605-07, 606 N.Y.S.2d at 880-81, 627 N.E.2d at 960-61. The

court considered whether Carmona, by confessing his crime to the police, effectively waived his right to invoke the privilege to exclude the testimony of the clergymen to whom he had confessed previously, a question the court answered in the negative. *See id.* at 608, 606 N.Y.S.2d at 880-81, 627 N.E.2d at 960-61. In the course of its analysis, the Court of Appeals explained:

> Although often referred to as a "priest-penitent" privilege, the statutory privilege is not limited to communications with a particular class of clerics or congregants....
>
> [T]he New York statute is intentionally aimed at all religious ministers who perform "significant spiritual counselling which may involve disclosure of sensitive matters".... Accordingly, what is more appropriately dubbed the "cleric-congregant" privilege is applicable to ministers of all religions, most of which have no ritual analogous to that of the Catholic confession.... New York's test for the privilege's applicability distills to a single inquiry: whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance....

Id. at 608-09, 606 N.Y.S.2d at 882, 627 N.E.2d at 961-62 (citations omitted). *Carmona* thus made it clear that far from discriminating among religions, the New York legislature intended § 4505 to protect confidential communications between clerics and congregants of all religions,[8] provided that

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[8] For example, § 4505 refers to "a clergyman, or other minister of any religion *or duly accredited Christian Science practitioner*." (Emphasis added.) Practitioners of Christian Science do not believe in an ordained

(footnote continued)

the communication in question qualifies as the kind that the legislature intended, as a matter of policy, to protect: those "made in confidence and for the purpose of obtaining spiritual guidance." *Id.* at 609, 606 N.Y.S.2d at 882, 627 N.E.2d at 962; *see also Keenan*, 47 N.Y.2d at 166, 417 N.Y.S.2d at 229, 390 N.E.2d at 1154 (explaining § 4505's policy rationale).

Most recently, in *Lightman v. Flaum*, 97 N.Y.2d 128, 736 N.Y.S.2d 300, 761 N.E.2d 1027 (2001), the New York Court of Appeals drew a critical distinction between the cleric-congregant privilege and other evidentiary privileges set forth in Article 45 of the New York Civil Practice Law and Rules. The court noted that "[s]tatutes and regulations specifically prohibit the disclosure of confidences and [at times prescribe] sanctions for professional misconduct" with regard to, *inter alios*, attorneys and physicians. *Id.* at 136, 736 N.Y.S.2d at 305, 761

(footnote continued)
clergy because "every member has equal standing with God." The Church of Christ, Scientist, *Questions and Answers: Why don't you have ministers*?, at http://www.tfccs.com/GV/QANDA/TMCQ2 (last visited June 27, 2002). But § 4505 requires Christian Science practitioners to be "duly accredited" in order for communications with them to fall under the aegis of the privilege; simply joining the church does not suffice to transform a lay person into a "cleric" to whom § 4505 applies, and accreditation requires a prescribed course of study. *See* The Church of Christ, Scientist, *Questions and Answers: What is a Christian Science Practitioner?*, at http://www.tfccs.com/ GV/QANDA/CSHQ5 (last visited June 27, 2002). By amending § 4505 to include an express reference to "duly accredited Christian Science practitioner[s]," N.Y. C.P.L.R. § 4505, the New York legislature signaled its intent to extend the privilege to religions that define clergy broadly. At the same time, § 4505's emphasis on the professional character of clergy and accreditation suggests that New York courts might not permit the nominal or perfunctory designation of lay persons as "clerics" for purposes of shielding from disclosure information otherwise outside of the scope of § 4505.

N.E.2d at 1032. By contrast, "clerics are free to engage in religious activities without the State's permission, they are not subject to State-dictated educational prerequisites and, significantly, no comprehensive statutory scheme regulates the clergy-congregant spiritual counseling relationship." *Id.*

Citing the Establishment and Free Exercise Clauses of the United States Constitution, the Court of Appeals emphasized that to hold court on the truth or falsity of religious beliefs, to engage in fact-finding to determine the "right" interpretation of a religion, would threaten "simultaneously [to] establish one religious belief as correct ... while interfering with the free exercise of the opposing faction's beliefs." *Id.* at 137, 736 N.Y.S.2d at 306, 761 N.E.2d at 1033 (citations and internal quotation marks omitted). Because establishing civil liability based on purported breaches of a § 4505 fiduciary duty would require a trier of fact to determine the "true" religious rules governing the revelation of communications between clergy and congregants, the court rejected the congregant's claim for damages based on an alleged breach of the "fiduciary duty" she asserted her rabbis owed her by virtue of § 4505. *Id.* at 137, 736 N.Y.S.2d at 305-306, 761 N.E.2d at 1032-33.

C. Applying § 4505

Guided by the foregoing decisions, it is clear that to determine whether § 4505 applies, four issues are implicated: the definition of "a clergyman, or other minister of any religion," the scope of § 4505's protection, the "ownership" of the privilege, and the effect of the privilege when asserted. On the facts of this case,

however, we need inquire as to only one: the scope of the privilege.[9]

To fall within § 4505's protection, a communication must be made "in confidence and for the purpose of obtaining spiritual guidance." *Carmona*, 82 N.Y.2d at 609, 606 N.Y.S.2d at 882, 627 N.E.2d at 962; *see also Keenan*, 47 N.Y.2d at 166, 417 N.Y.S.2d at 229, 390 N.E.2d at 1154; *People v. Drelich*, 123 A.D.2d 441, 442-43, 506 N.Y.S.2d 746, 748 (2d Dep't 1986); *People v. Reyes*, 144 Misc.2d 805, 807, 545 N.Y.S.2d 653, 654 (Sup.Ct. Queens County 1989). Section 4505 does not operate to "enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happens to be a religious minister." *Carmona*, 82 N.Y.2d at 609, 606 N.Y.S.2d at 882, 627 N.E.2d at 962; *see also In re Fuhrer*, 100 Misc.2d 315, 320, 419 N.Y.S.2d 426, 430-31 (Sup. Ct. Richmond County 1979) (discussing the scope of the privilege).

Thus, in *Keenan*, the Court of Appeals refused to apply the privilege where "the questions which appellant [an ordained Catholic priest] was directed to answer [in a grand jury hearing] did not jeopardize the atmosphere of confidence and trust which allegedly enveloped the relationship between appellant and [the

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[9] For purposes of the analysis that follows, we note that under New York law the privilege "belongs" to the congregant whose burden it is to establish that the privilege applies, *see, e.g., De'Udy v. De'Udy*, 130 Misc.2d 168, 173, 495 N.Y.S.2d 616, 619 (Sup.Ct. Nassau County 1985) (stating that "the privilege is that of the penitent, not the clergy"), and thus the congregant bears "[t]he burden ... to establish that a communication sought to be shielded was made for the purpose of seeking religious counsel," *People v. Drelich*, 123 A.D.2d 441, 443, 506 N.Y.S.2d 746, 748 (2d Dep't 1986); *see also People v. Schultz*, 161 A.D.2d 970, 971, 557 N.Y.S.2d 543, 545 (3d Dep't 1990) (noting that the "burden of establishing the statutory confidentiality of a communication is upon the individual invoking the privilege").

congregant]." 47 N.Y.2d at 167, 417 N.Y.S.2d at 229-30, 390 N.E.2d at 1154. "Compelling disclosure as to these matters would not do violence to the social policies underlying the priest-penitent privilege...." *Id.* at 167, 417 N.Y.S.2d at 230, 390 N.E.2d at 1154. Similarly, in *Fuhrer*, Supreme Court, Richmond County, held the privilege inapposite where "[n]one of the questions propounded to the Witness appear to involve 'spiritual' matters ... [or] communications made for the purpose of seeking religious counsel, advice, solace, absolution or ministration." 100 Misc.2d at 321, 419 N.Y.S.2d at 431 (internal punctuation omitted). And in *United States v. Wells*, 446 F.2d 2 (2d Cir.1971), we held that a defendant's letter to a priest requesting that the priest contact a federal agent fell outside the scope of the privilege, noting that "[t]he letter contains no hint that its contents were to be kept secret, or that its purpose was to obtain religious or other counsel, advice, solace, absolution or ministration," *id.* at 4.

This principle, New York case law makes clear, applies to all religions without distinction. *See People v. Drelich*, 123 A.D.2d 441, 443, 506 N.Y.S.2d 746, 748 (2d Dep't 1986) (finding communications made to a rabbi "for the secular purpose of seeking assistance in the retention of counsel" outside § 4505's scope); *People v. Schultz*, 161 A.D.2d 970, 971, 557 N.Y.S.2d 543, 545 (3d Dep't 1990) (allowing no privilege where defendant sought a priest for the purpose of contacting an attorney, not to seek "religious counsel, advice, solace, absolution or ministration"); *People v. Johnson*, 115 A.D.2d 973, 497 N.Y.S.2d 539, 539-40 (4th Dep't 1985) (finding communications made by a Muslim to fellow members of his mosque not privileged because it was not the defendant who initiated the conversations for the purpose of seeking spiritual guidance but

rather "members of the mosque who testified that they were motivated by fear that defendant might be dangerous").[10]

III. Analysis of Cox's Privilege Claim

A. Principles of Interpretation

1. Construction of Evidentiary Privileges. Because claims of privilege derogate from the public's " 'right to every [person's] evidence,' " *Trammel*, 445 U.S. at 50 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)), "they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,' " *id.* (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)); *see also Nixon*, 418 U.S. at 709-10, (noting the exceptional nature of evidentiary privileges); *accord Keenan*, 47 N.Y.2d at 168, 417 N.Y.S.2d at 230, 390 N.E.2d at 1155 (emphasizing the "enduring command that every man owes a duty to society to give evidence when called upon to do so") (internal punctuation and citations omitted).

2. A.A.'s Status for Purposes of Establishment Clause Analysis. We have twice treated A.A. as a "religion" for purposes of Establishment Clause analysis. *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 407 (2d Cir.2001);

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[10] Consistent with New York law's emphasis on the *purpose* of the communication, New York courts also have held that "[a] confession by a penitent to a clergyman for spiritual advice, aid or comfort is privileged even though the penitent is not a member of the church to [sic] which she seeks spiritual advice." *Kohloff v. Bronx Sav. Bank*, 37 Misc.2d 27, 27- 28, 233 N.Y.S.2d 849, 850 (Civ. Ct.1962); *see also Fuhrer*, 100 Misc.2d at 320, 419 N.Y.S.2d at 430 (same; citing *Kohloff*).

Warner v. Orange County Dep't of Prob., 115 F.3d 1068, 1075 (2d Cir.1997), *reaff'd after remand*, 173 F.3d 120 (2d Cir.), *cert. denied*, 528 U.S. 1003 (1999). In *Warner*, we held that the Department of Probation of Orange County, New York, violated the Establishment Clause by in effect compelling the plaintiff to attend A.A. meetings as a condition of probation, because " 'at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.' " 115 F.3d at 1074 (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)). We observed that

> [t]he A.A. program to which [the plaintiff] was exposed had a substantial religious component. Participants were told to pray to God for help in overcoming their affliction. Meetings opened and closed with group prayer.... We have no doubt that the meetings [the plaintiff] attended were intensely religious events.

Id. at 1075. In *DeStefano*, where we inquired into the propriety of State funding of an alcoholism treatment center, we said that the district court had correctly treated A.A. as "a 'religion' for Establishment Clause purposes." 247 F.3d at 407. We perceived "no basis" for distinguishing the A.A. program at issue in *DeStefano* from that in *Warner* because both "use[d] the same Twelve Step system," distributed literature encouraging members to take "religious 'steps,' " and "conduct[ed] meetings in which these beliefs [we]re inculcated." *DeStefano*, 247 F.3d at 407.[11]

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[11] We are not alone in concluding that A.A.'s activities must be treated as religious for purposes of such Establishment Clause analysis. Not only did the New York Court of Appeals reach the same conclusion, *Griffin*, 88 N.Y.2d at 683, 649 N.Y.S.2d at 908, 673 N.E.2d at 103, to the best of our

(footnote continued)

The district court in this case now before us evidently thought itself constrained by these decisions to conclude that § 4505 must be extended to protect from disclosure communications made among members of A.A. *See Cox II*, 154 F.Supp.2d at 792. It saw "no principled basis for a court to hold that AA is a religion for Establishment Clause purposes, and yet that the disclosure of wrongs to a fellow member as ordained by the Twelve Steps does not qualify for purposes of a privilege granted to other religions similarly situated." *Id.*

Asking that we reject the district court's conclusion, the appellant cautions us against "establishing" A.A. as a "religion" and "concomitantly labeling its members as members of a religious sect," lest we offend "atheists and agnostics [and members of other organized religions] who have reconciled their personal beliefs with their participation in AA." Appellant's Br. at 49. We do no such thing.[12]

(footnote continued)
knowledge, no court presented with an Establishment Clause challenge implicating A.A. or a comparable therapy program incorporating religious concepts has reached a contrary one. *See DeStefano*, 247 F.3d at 407 (collecting cases); *Rauser v. Horn*, No. 98-1538, 1999 WL 33257806, at *7, 1999 U.S. Dist. LEXIS 22583, at *19-*20 (W.D. Pa. Nov.2, 1999) (finding coerced participation in A.A. or the materially indistinguishable Narcotics Anonymous program as a condition of parole to violate the Establishment Clause), *rev'd on other grounds*, 241 F.3d 330 (3d Cir.2001); *cf. In re Garcia*, 106 Wn. App. 625, 630, 24 P.3d 1091, 1094 (2001) (agreeing that "mandating attendance at [A.A.] classes" violates the Establishment Clause but finding no violation where "alternative classes without religious-based content [we]re provided").

[12] Neither *Warner* nor *DeStefano* nor *Griffin* held that A.A. is "a religion"; rather, because of its "substantial religious component," *Warner*, 115 F. 3d at 1075, we have treated A.A. as a religion for purposes of certain
(footnote continued)

Organizations and community activities of many kinds, including, as here, therapeutic recovery-programs for alcohol or drug addiction, may involve "substantial religious component[s]," *Warner*, 115 F.3d at 1075, such that the government may not coerce individuals to participate in them or fund the inculcation of their beliefs without violating the Establishment Clause. But plainly, as the appellant urges, such organizations or community activities do not, for that reason, become or consider themselves to be "religions" in the ordinary sense of the word.[13] Step Three of the A.A. Twelve-Step Program invites A.A. members "to turn [their] will and [their] lives over to the care of God as [they] understand him." We doubt, however, that many members of A.A. would therefore identify themselves as members of "the A.A. religion." A Catholic, Protestant, Jewish, Muslim, or Zoroastrian alcoholic need not relinquish his or her religious beliefs and "convert" to A.A. in order to follow its precepts.

We have nonetheless held that when engaging in Establishment Clause analysis in certain settings we must treat A.A. the

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(footnote continued)
Establishment Clause analyses. *See DeStefano*, 247 F.3d at 423 (declining to distinguish the religious activities of A.A. from the activities of "other religions *for Establishment Clause purposes* ") (emphasis added); *accord Griffin*, 88 N.Y.2d at 683, 649 N.Y.S.2d at 908, 673 N.E.2d at 103 (observing that A.A.'s "expressions and practices constitute, as a matter of law, religious exercise *for Establishment Clause purposes*") (emphasis added); *cf. DeStefano*, 247 F.3d at 422 ("It is difficult to imagine A.A. as the official or unofficial state religion of New York.").

[13] A.A. literature submitted by Cox describes A.A. not as "a religious society," but as a "program of recovery from alcoholism," albeit one "based on acceptance of certain spiritual values." According to the literature, A.A. disclaims the suggestion that it is "a religion" in the same sense as, for example, Catholicism, Judaism, Buddhism, or Islam.

same as we would a group or organization that is a "religion" in the popular sense because some of A.A.'s activities and modes of expression are religious in nature. As the Seventh Circuit observed, the inclusion of qualifiers in the tenets of A.A. (e.g., "God *as we understood Him* ")—which indicates that A.A. does not mandate one religious dogma--fails to remove it from the realm of religious activity in which the government may not, consistent with the Establishment Clause, compel citizens to participate and which the government may not fund:

> True, [the] God [referred to in the twelve steps of the materially indistinguishable Narcotics Anonymous program] might be known as Allah to some, or YHWH to others, or the Holy Trinity to still others, but the twelve steps consistently refer to "God, as we understood *Him*." Even if we expanded the steps to include polytheistic ideals, or animistic philosophies, they are still fundamentally based on a religious concept of a Higher Power.

Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir.1996) (emphasis in original).

We have treated A.A. the same as we would a traditional religion where the State compelled participation in A.A. despite its "intensely religious" nature, *Warner*, 115 F.3d at 1075; and where the State allegedly funded "*governmental* indoctrination" in A.A., *DeStefano*, 247 F.3d at 415 (emphasis in original). In *DeStefano* we explained, citing in part *Agostini v. Felton*, 521 U.S. 203, 234 (1997), that

> when presented with Establishment Clause challenges, we are required to ask " 'whether the government acted with the purpose of advancing or inhibiting religion' and

> 'whether the aid has the effect of advancing or inhibiting religion.' " ... We employ "three primary criteria" to answer the latter question: [1] whether the action or program "results in governmental indoctrination; [2] defines its recipients by reference to religion; or [3] creates an excessive entanglement."

DeStefano, 247 F.3d at 406 (internal citations and punctuation omitted). Both *Warner* and *DeStefano* were decided under the first of the "three primary criteria"—governmental indoctrination. Both involved governmental coercion to engage in or pay for religious activity. It is in the course of that inquiry in *DeStefano* that we referred to A.A. as "a 'religion' for Establishment Clause purposes."

But Cox's challenge to New York's cleric-congregant privilege here appears to be based on the second of the "three primary [*Agostini*] criteria": whether New York determines the applicability of its cleric-congregant privilege by reference to the religion of the person asserting it. We are not certain whether we would treat A.A. the same as we treat traditional religions in this context. We need not address this question, however, because, as we will discuss, Cox failed to establish that he spoke with fellow A.A. members "in confidence and for the purpose of obtaining spiritual guidance." *Carmona*, 82 N.Y.2d at 609, 606 N.Y.S.2d at 882, 627 N.E.2d at 962. His communications at issue here would therefore not be privileged even if A.A.'s activities were required to be treated the same as those of Catholicism, Judaism, Islam, and Christian Science.

B. Analysis of Cox's Privilege Claims

Cox confessed his killing of the Chervus—at times explicitly, at other times less so—to no fewer than seven fellow A.A.

members: (1) Jessica, his former girlfriend, (2) Mr. C, Cox's A.A. sponsor, (3) Mr. O, a senior member of Cox's A.A. chapter, (4) Mr. A, a former gang member who attended some A.A. meetings at which Cox was present, (5) Mr. S, another fellow A.A. member, (6) Mr. R, Cox's roommate and personal friend, and (7) Ms. H, another A.A. member who shared an apartment with Cox and R for about two months. Cox, the congregant seeking to invoke the privilege, bore the burden to establish that his communications to these persons fell within the scope of § 4505. *See Drelich*, 123 A.D.2d at 443, 506 N.Y.S.2d at 748; *accord Schultz*, 161 A.D.2d at 971, 557 N.Y.S.2d at 545. He failed to carry it. Assuming that all the relevant conversations were made in confidence, the record makes clear that Cox did not confess his culpability for the Chervu killings "for the purpose of obtaining spiritual guidance." *Carmona*, 82 N.Y.2d at 609, 606 N.Y.S.2d at 882, 627 N.E.2d at 962.

The first fellow A.A. member to whom Cox confessed was Jessica, then his girlfriend. In a fit of tears, Cox told her that he believed he had killed the Chervus. Nothing in Cox's testimony suggests that this emotional outpouring to a lover reflected a search for spiritual guidance.

Jessica told Cox to speak to his A.A. sponsor, Mr. C., about his fears. Cox argues that he sought C's "guidance" about a spiritual matter, namely, how to handle the fourth step of A.A.'s religiously imbued program of recovery from alcoholism. But the record does not, we think, bear out this argument. C, by his own account, did not think himself capable of dealing with Cox's confession. He responded by asking for and receiving Cox's permission to speak to other A.A. members. Mr. C and Mr. O, with whom C later shared Cox's story, advised Cox to get "a private detective or a lawyer." While the relevant inquiry

is what Cox sought rather than what advice C and O, the putative clerics, in fact gave him, the nature of their ongoing communications with Cox suggests that he sought practical and legal, not spiritual, advice. *See Wells*, 446 F.2d at 4 (rejecting a federal common-law privilege claim where the defendant requested that a priest help him to contact an FBI agent); *Drelich*, 123 A.D.2d at 443, 506 N.Y.S.2d at 748 (rejecting a privilege claim under N.Y. C.P.L.R. § 4505 where the defendant sought the advice of clergy "for the secular purpose of seeking assistance in the retention of counsel"); *Schultz*, 161 A.D. at 971-72, 551 N.Y.S.2d at 545 (same).[14]

Cox subsequently confessed to Mr. A because, Cox testified, A "was someone who talked openly about his gang involvement in Oakland ... someone who I felt possibly could identify with what I was going through." Cox appears to have viewed A as a friend with whom he might share a common experience. A testified that Cox spoke to him because he "was getting close to the fourth step" and "didn't want to go to jail." No plausible reading of this testimony supports the view that Cox sought A's spiritual guidance. Similarly, there is no basis in the record for a conclusion that Cox's multiple conversations with Mr. S., in which Cox described the Chervu killings in some detail, had anything whatever to do with Cox's desire for spiritual or religious guidance.

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[14] Cox's confession to Mr. C came closest to having spiritual overtones. But even if Cox's confession to C could be characterized as a quest for spiritual guidance, and even if C on this basis had refused to disclose the content of Cox's communications to the police, it would not have prevented the police from identifying Cox as a suspect. There is no doubt that based on the information provided by at least six other A.A. members to whom Cox confessed, the police nonetheless would have identified Cox, questioned him, and matched his palm prints to those found at the crime scene and that those six would have been available to testify against Cox at trial.

Finally, Cox revealed his culpability for the Chervu killings to Mr. R, his roommate, and to Ms. H, who proceeded to share their apartment for two months. The record indicates that Cox told R about the killings not to seek spiritual guidance, but because the two of them had become friends. And far from seeking spiritual guidance from H, the A.A. member who first informed law enforcement officers of Cox's story, Cox testified that he told H about the killings because he thought she should be aware of them before deciding to share an apartment with him.

In sum, Cox spoke with other A.A. members primarily to unburden himself, to seek empathy and emotional support, and perhaps in some instances to seek practical guidance (e.g., legal advice). Nothing in the record suggests that Cox confessed to A.A. members "for the purpose of obtaining spiritual guidance." *Carmona*, 82 N.Y.2d at 609, 606 N.Y.S.2d at 882, 627 N.E.2d at 962. Under New York State law, the statements made by Cox therefore do not fall within the scope of § 4505, even assuming that A.A. is "a religion" to which the cleric-congregant privilege ordinarily would apply.[15]

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[15] Cox does not argue that New York's cleric-congregant privilege is unconstitutional because it requires communications to be made for the purpose of obtaining spiritual guidance. He does argue that the Establishment Clause requires New York State to extend the privilege to "less traditional forms of religious expression, such as confessions made to non-paid fellow-observers of a non-traditional, non-hierarchical faith." Appellee's Br. at 28-29; *see also id.* at 30 (arguing that New York's legislature may not require a "professional" clergy-congregant relationship to exist). Because we hold that Cox's communications to fellow A.A. members fall outside § 4505's scope in any event, we do not reach the question whether the Establishment Clause would require New York State to extend its privilege, as the Third Circuit put it, "to comprehend communications to and among members of sects that denominate each and

(footnote continued)

C. Considerations of Policy: An "A.A. Privilege"

In response to Cox's conviction, "[n]umerous self-help groups ... expressed outrage." Jessica G. Weiner, Comment, *"And the Wisdom to Know the Difference": Confidentiality v. Privilege in the Self-Help Setting,* 144 U. Pa. L. Rev. 243, 244 (1995); *see also* Jan Hoffman, *Faith in Confidentiality of Therapy is Shaken,* N.Y. Times, June 15, 1994, at A2; Jimmy Breslin, *Without a Shield, AA May Not Survive*, Newsday, June 14, 1994. While one witness who testified at Cox's trial reportedly remarked that "AA is not above the law," Breslin, *supra* (quoting "Ms. S"), others thought that the conviction threatened the confidentiality of A.A., a *sine qua non* of its therapeutic efficacy as a program for recovering alcoholics, *see id.* A priest, also an A.A. member, commented:

> The confidentiality at AA is almost the same as the confessional.... Good Lord, if you don't have it at an AA meeting, then we are all threatened.... [O]nce you make [A.A.] people talk about one thing, what is to stop the authorities from deciding that they can come around for anything, an income tax case. Therefore, is a double murder more important than the confidentiality of AA? There had to be a better way to solve this case.

Id. (quoting anonymous A.A. member and priest).

(footnote continued)
every member as clergy, proclaim that all communications have spiritual significance, or dictate that all communications among members, whether essential to and in furtherance of the purportedly privileged communication or not, shall be confidential." *In re Grand Jury Investigation*, 918 F.2d at 384 n. 13.

We repeat our observation in *DeStefano* that "[w]e have no reason whatever to doubt what we have been told: that A.A. is a vastly worthwhile endeavor; that it has saved the lives, health or well-being of thousands of Americans, at least in part because it requires participants" to engage in intensive religious self-reflection. *DeStefano*, 247 F.3d at 422. Cox may be a case in point. He testified that since joining A.A., he has never again consumed an alcoholic beverage. We also have no reason to doubt the importance of confidentiality of communication to the success of the A.A. program.

But our role is not to decide the policy issues that underlie the State of New York's legislative or judicial choice to adopt or reject such an evidentiary privilege—whether the confidentiality of A.A., and the social values it may promote, outweigh the State's interests in enforcing its criminal law and promoting the public's right to every person's evidence. Our role is strictly limited. We must decide whether the state court's refusal to shield Cox's communications with fellow A.A. members from disclosure, even though New York law protects certain kinds of disclosures between clergy and congregants, violates the Establishment Clause. We hold that it does not because, even if the Establishment Clause requires that some communications between A.A. members in some circumstances be protected by New York's cleric-congregant privilege, Cox's communications to fellow A.A. members do not qualify for such protection. We have neither the occasion nor the authority to consider the wisdom of that conclusion or the policy issues that may be relevant to New York's decision whether to protect the confidentiality of communications among members of A.A. Those considerations remain the exclusive province of New York

State's legislature and governor in enacting state law,[16] and its courts in interpreting statutes and crafting common-law privileges.[17]

CONCLUSION

Because Cox failed to establish that his communications to members of A.A. were made in confidence for the purpose of obtaining spiritual guidance, we hold that they are not privileged under well-established principles of New York law.[18] We therefore reverse and remand with instructions to the district court to vacate the writ of habeas corpus and dismiss the petition.

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[16] *Cf.* 42 U.S.C. § 290dd-3 (providing a qualified privilege to federal prisoners with respect to records of their "identity, diagnosis, prognosis, or treatment" in connection with alcohol-abuse recovery programs).

[17] Professor Wigmore identified "four canons" by which the "propriety of [a common law] privilege may be tested": First, "[d]oes the communication originate in a confidence of secrecy?" Second, "[i]s confidentiality essential to the relation?" Third, "[d]oes the ... relation deserve recognition and countenance?" Fourth, "[w]ould the injury to the ... relation [caused] by compulsory disclosure be greater than the benefit to justice?" 8 J.H. Wigmore, *supra*, at 878.

[18] The district court held that Cox's "numerous remaining challenges to [his] conviction ... have been considered by this Court to the extent that any of them alone or together arise to a Constitutional level.... [They] are lacking in merit." *Cox II*, 154 F.Supp.2d at 793. We agree with the conclusion of the district court.

Appendix C—Order of Second Circuit Court of Appeals dated September 13, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the thirteenth day of September two thousand two.

PAUL COX,

Petitioner-Appellee,

v. Docket No: 01-2515

DAVID H. MILLER,

Respondent-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Paul Cox

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: s/ Arthur M. Heller
Arthur M. Heller,
Administrative Attorney

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
SEP 13 2002
Roseann B. MacKechnie, Clerk